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ABSTRACT

This issue of the "Free Speech Yearbook" contains the following: "Between Rhetoric and Disloyalty: Free Speech Standards for the Sunshine Soldier" by Richard A. Parker; "William A. Rehnquist: Ideologist on the Bench" by Peter E. Kane; "The First Amendment's Weakest Link: Government Regulation of Controversial Advertising" by Patricia Goss: "Gaining Access to the Media: Some Issues and Cases" by Timothy R. Cline and Rebecca J. Cline; "Repression in Great Britain: 1792-1795" by James S. Measell; "The Supreme Court and the First Amendment: 1974-1975" by William A. Linsley; and "Freedom of Speech Bibliography: July 1974-June 1975" by David Pshelman. (TS)

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BETWEEN RHETORIC AND DISLOYALTY
FREE SPEECH STANDARDS FOR THE SUNSHINE SOLDIER

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On February 20, 1974, the Solicitor General of the United States appeared before the Supreme Court and proferred the Administration's position concerning one of the most important challenges to military law ever to reach the highest court in the land.[1] At issue was the constitutionality of the two so-called "General Articles" of the Uniform Code of Military Justice. Article 133 proscribes "conduct unbecoming an officer and a gentleman."[2] Article 134, which applies to all military personnel, prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed force," and "all conduct of a nature to bring discredit upon the armed forces."[3] Courts-martial under these General Articles have secured an estimated one hundred thousand convictions since their enactment in 1951.[4] That the challenge to their constitutionality should be issued (and thus far sustained in federal courts) upon claims of alleged deprivation of First Amendment rights is indeed fitting,[5] for freedom of expression is subject to stringent limitation within the military milieu.

To delineate, explicate, and evaluate the complex constituents of military law concerning free speech would require a voluminous report. This article focuses upon the military courts' own view of a "proper" standard for governing political expression, a perspective encompassing a different spectrum of issues from those in question in the "General Articles" cases. This perspective is a juridical reaction to the rhetoric of an army of "sunshine soldiers"--those conscripted or compelled to enlist during the turbulent Sixties. Chief Judge Quinn of the United States Court of Military Appeals succinctly stated the issue:

> The Vietnam war has evoked a vast outpouring of written and oral comment. The language of many of these comments is poised on a thin line between rhetoric and disloyalty to the United States.[6]

The delineation of this boundary of permissible utterances is of consummate significance to the student of free speech. This perimeter specifies a sub-class of restraints applicable to two millions of this nation's citizens.

I

Roger Priest, a journalist seaman apprentice in the Navy, chose a dramatic technique to emphasize his opposition to America's Vietnam policy and to the military establishment. Priest published and distributed an underground newspaper replete with hackneyed phrases of revolution: "smash the state," "free us now," "guns baby guns," "bomb America," "our goal is liberation ... by any means necessary." He was convicted of "printing and distributing, with intent to promote disloyalty and disaffection among members of the armed forces, issues of a publication which, in its entirety, contained statements disloyal to the United States." In his unanimous opinion upholding Priest's conviction, Chief Judge Darden settled a question that has been the subject of considerable legal spectulation.

> The proper standard for the governance of free speech in military law is still found, we believe, in Mr. Justice Holmes's /sic/ historic assertion in Schenck v. United States ...: "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[7]

The responses to three derivative questions constitute the aim of this paper. First, what does the "clear and present danger" test mean to the Priest court? Second, is this test a "proper standard for the governance of" the liberty of expression? Third, is this test "the proper standard" for free speech cases, or should the courts employ other tests in varying circumstances? I consider each in turn.

II

Judge Darden made five successive points in his argument for a specialized view of Holmes' test. First, he said that the "only real question" is the degree of danger prerequisite to punishment of the accused.[8] Second, he rejected the Supreme Court's own standard as propounded in Brandenburg v. Ohio[9] on the ground that "the danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired" before conviction can be attained.[10] Third, Judge Darden claimed that "free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force ...."[11] Fourth, he relied upon the Hand-Vinson interpretation of the clear and present danger test to conclude: "Our inquiry, therefore, is whether the gravity of the effect of accused's publications on good order and discipline in the armed forces, discounted by the

improbability of their effectiveness on the audience he sought to reach, justifies his conviction."[12] Fifth, he rejected "the concept that 'success or probability of success is the criterion' by which punishment of forbidden speech is to be measured."[13] Judge Darden concluded that Priest's publications "tended palpably and directly to affect military order and discipline," and thus were punishable.[14]

The clear and present danger test has meant many things to many people: even to its originator, Justice Holmes, it acquired new dimensions of meaning during its historical evolution.[15] The military courts have shown a definite tendency to choose the Hand-Vinson interpretation of the test: that "the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[16] But the Priest court added an element from Chief Justice Vinson's opinion in Dennis: "the lack of success is not the criterion, for the Government is entitled to protect itself in advance against a calculated call for revolution."[17] In other words, when national security is at issue, proof of mere tendency to produce the evils is sufficient to justify conviction. This is the view of "clear and present danger" that the Court of Military Appeals articulated in United States v. Priest.

The pre-eminence of national security has considerable precedent in military free speech decisions. In 1954, in his opinion in United States v. Voorhees, Judge Latimer argued that the clear and present danger test could only be applied if temporal factors were adjusted to the peculiar demands of military necessity. Whether in war or peace, he argued, "conditions do not permit meeting lies with the truth," for "one false rumor, properly timed, may destroy an army."[18] Hence the martial purpose is one of the "attending facts and circumstances" controlling the right to speak freely in any application of the danger test.[19] The Army Court of Military Review officially sanctioned Judge Latimer's views in United States v. Bayes.[20]

A second pair of decisions supportive of the Court in Priest is worthy of mention. In United States v. Howe, the Court of Military Appeals held that Lieutenant Howe's participation in an off-post demonstration while off duty and out of uniform "constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument" because the Vietnam war was in progress.[21] The Army Court of Military Review upheld the convictions of Privates Amick and Stolte because their actions in urging others "to refuse to be a part of this stupidity" (referring to the Vietnam war), and to join a serviceman's union, "presented a clear and present danger to maintaining the military discipline essential to an effective fighting force."[22] In neither case did the courts explain why the danger was clear and present. These courts simply regarded the claim that the Vietnam war precluded dissident activities as prima facie valid.

A fifth precedent illustrates yet another view of clear and present danger. In United States v. Daniels, the Court of Military Appeals fulfilled a statutorily-imposed proof requirement of "clear and present danger" by interpreting a "call for refusal of duty" made to a group of servicemen as a means of relying upon "implied force" to achieve success; hence the persuasion "was not a trivial hazard but a clear and present danger to impairment of the loyalty and obedience" of the group.[23]

The Priest opinion was apparently the product of Judge Darden's reservations with regard to these earlier philosophies. Judge Latimer's wholesale proscription of free speech rights was a carte blanche for military necessity. The Howe-Amick position begged the question. The Daniels formula ignored the "presence" of the danger entirely. The Supreme Court had only recently invited challenges to Article 134 on vagueness grounds and discussed the "travesties of justice perpetrated under" the Uniform Code.[24] The Priest court felt compelled to provide a firm underpinning of Priest's conviction in civilian law, but without reckless abandonment of the exigencies of military circumstance. To that end Judge Darden directed his opinion.

III

How valuable an instrument is Judge Darden's test for distinguishing "between rhetoric and disloyalty?" His argument merits close examination.

First, Judge Darden claimed that the only real question is the degree of danger, and cited United States v. Howe.[25] Yet the statement quoted comes from the text in Constitution of the United States of America, 1963 edition, and is some unknown author's comment on the impact of the Dennis decision.[26] Is degree of danger, rather than proximity, the critical issue? Justice Harlan, in Yates v. United States, clarified (and perhaps amended) Dennis by excepting "mere doctrinal justification for forcible overthrow" from the restrictions of the Smith Act as "too remote from concrete action" to merit inclusion in the Dennis prohibitions.[27] The Supreme Court in Noto held that "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violance, is not the same as preparing a group for violent action and steering it to such action."[28] Hence the Brandenburg court noted: "These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy ... except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action."[29] Judge Darden's claim that the degree of danger is the only real question is at odds with the historical evidence.

Second, Judge Darden dismissed the ruling in Brandenburg as controlling in the Priest case because "the danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained."[30] But this is clearly a "straw man" attack, for Brandenburg proclaims no such requirement. The Supreme Court declared only that the danger must be imminent and likely to result; it need not have already resulted.[31]

Third, Judge Darden claimed that military exigencies must be weighed against free speech. "The hazardous aspect of license in this area is that the damage done may not be recognized until the battle has begun. At that point, it may be uncorrectible or irreversible."[32] But if the nexus between the speech-act and the harm is so tenuous, how can Judge Darden remain confident that the cause-effect relationship actually exists? William A. Johnson analyzed this connection and concluded:

> Nothing has been found to indicate that performance of the individual soldier is significantly impaired by his ideological or political beliefs, or that one soldier's exposition of political views measurably influences the beliefs of other soldiers. Some evidence even indicates that free expression may substantially enhance the realization of important military goals and requirements. Previous exposure to an atmosphere of free political discussion may benefit soldiers who are later subjected to the pressures and techniques of modern prisoner-of-war camps. Also, tolerance of dissent may enable the individual soldier to act rationally when given unlawful orders.[33]

No American military court has ever cited a single harm from any speech-act performed by any serviceman at any time. The record is destitute of factual examples; it is replete with "tendencies."[34]

Fourth, Judge Darden referred to the Hand-Vinson formula as applicable in the instant case. But "the gravity of the evil, discounted by its improbability" makes no more sense in Priest than in Dennis, for in both cases the respective Justices subsequently rejected the concept that "success or probability of success is the criterion" by which punitive action is determinable.[35] In fact, in neither case was the danger "present" or "imminent," so the Court was compelled to exclude the time requirements or dismiss the defendants. The harm of this exclusion is aptly demonstrated when the judge perceives the "gravity of the evil" discounted by nothing. John Washnik incorrectly described the Hand-Vinson formula as a "clear and probable danger test;"[36] it is a "clear and remote danger test" so long as the danger is great.

Fifth, Judge Darden concluded that Priest's publications "tended palpably and directly to affect military order and discipline."[37] The appearance of the word "tended" is crucial to the issue, for that term yields a bitter harvest of memories from dusty--but never forgotten--casebooks of constitutional law. The bad tendency test for First Amendment cases celebrated its finest hour in Whitney v. California, when Justice Sanford ruled "that a state in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question."[38] But the Supreme Court in the Brandenburg case expressly overruled its prior decision in Whitney.[39] Thus Judge Darden's ultimate recourse to a bad tendency test in United States v. Priest relied upon a standard to which the Supreme Court had denied constitutional sanction three years previously.

IV

The Judge Dardens of the military environment may forestall Supreme Court scrutiny of their newly-devised standard for free speech by casually disavowing bad tendency language in future cases. Eventually, however, the hollow premises of military restraints upon free speech will collapse upon examination, and new tests must be fashioned. Will a single principle suffice for all cases?

Judge Darden wrote of "the proper standard for a governance of free speech in military law;"[40] experience with prior restraint cases in civilian life, however, should single-handedly discredit this unitary approach. In the Pentagon Papers case, as in previous and similar instances, the notion of pre-publication censorship was curtly dismissed.[41] But in the only "prior restraints" case ever to reach the Court of Military Appeals, two of the three judges utterly failed to distinguish between censorship and post hoc punishment when applying jurisprudential criteria for determination of guilt.[41] This insensitivity to the rudiments of constitutional guarantees typifies the First Amendment holdings of military appellate courts. History indicates that these judges need civilian guidance in the future development of standards for free speech.

Judge Darden's prescription in United States v. Priest is hopelessly antiquoted and unconstitutional precedent. Yet from this examination of the issues one postulate emerges. the cultivation of standards for the protection of free speech in the armed services is an ideal whose time has come.

FOOTNOTES

[1]Secretary of the Navy v. Avrech, 72-1713, and Parker v. Levy, 73-206, 42 LW 3482 (February 26, 1974).

[2]10 U.S.C. S 933 (1970).

[3]10 U.S.C. S 934 (1970). A third clause, prohibiting "all crimes and offenses not capital," relates only to crimes and offenses proscribed by Congress and is not at issue in the cases discussed here. See "Notes: Taps for the Real Catch-22," Yale Law Journal, LXXXI (July, 1972), 1518, n3.

[4]Estimate of David F. Addlestone of the Military Rights Project of the American Civil Liberties Union, in "Levy, Antiwar Army Physician, Wins a Reversal of Conviction," New York Times, April 19, 1973, p. 22.

[5]The decisions appealed are Avrech v. Secretary of the Navy, 477 F.2d 1237 (1973); and Levy v. Parker, 478 F.2d 772 (1973).

[6]United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141, at 146 (1970), (majority opinion).

[7]United States v. Priest, 21 U.S.C.M.A. 564, 45 C.M.R. 338, (1972). The citation from Schenck is at 344. The original quotation is from 249 U.S. 47, at 52 (1919).

[8]At 344, citing United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429, at 487 (1966). The reference is actually to a document prepared by the Legislative Reference Service.

[9]395 U.S. 444 (1969).

[10]At 344.

[11]Ibid.

[12]At 344-45. Judge Learned Hand announced the interpretation in United States v. Dennis, 183 F.2d 201, at 212 and 215 (1950). Chief Justice Vinson adopted Hand's version in Dennis v. United States, 391 U.S. 494, at 510 (1951), (majority opinion).

[13]At 345, citing Dennis v. United States, at 510.

[14]At 346.

[15]See for example, Frank R. Strong, "Fifty Years of 'Clear and Present Danger': From Schenck to Brandenburg--And Beyond," Supreme Court Review, 1969, pp. 41-80, especially 45-47.

[16]See footnote 12, above.

[17]United States v. Priest, at 345.

[18]4 U.S.C.M.A. 509, 16 C.M.R. 83, at 108 (1954).

[19]At 106.

[20]22 C.M.R. 487 (1956).

[21]17 U.S.C.M.A. 165, 37 C.M.R. 429, at 437 (1966).

[22]40 C.M.R. 720, at 722 and 723 (1969).

[23]19 U.S.C.M.A. 529, 42 C.M.R. 131, at 137 (1970).

[24]O'Callahan v. Parker, 395 U.S. 258, at 266 (1969).

[25]United States v. Priest, at 344.

[26]United States v. Howe, at 437.

[27]354 U.S. 298, at 321-22 (1957).

[28]Noto v. United States, 367 U.S. 290, at 297-98 (1961).

[29]Brandenburg v. Ohio, 395 U.S. 444, at 447 (1969).

[30]At 344 (emphasis supplied).

[31]See footnote 29 above, and accompanying text.

[32]At 344 and 345.

[33]"Military Discipline and Political Expression: A New Look at an Old Bugbear," Harvard Civil Rights--Civil Liberties Law Review, VI (May, 1971), 525-44, at 527.

[34]Ibid at 529-30.

[35]United States v. Priest, at 345, citing Dennis v. United States, at 510.

[36]John Washnik, "Comment," Catholic University Law Review, I (January, 1951), 104.

[37]At 346, (emphasis supplied).

[38]274 U.S. 357, at 371 (1927).

[39]At 435.

[40]At 344.

[41]New York Times Co. v. United States, 403 U.S. 713 (1971).

[42]United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954). Judges Quinn and Latimer failed to make the elementary distinction referred to in the text. See also, "Prior Restraints in the Military," Columbia Law Review, LXXIII (May, 1973), 1089-1119.

WILLIAM H. REHNQUIST: IDEOLOGIST ON THE BENCH

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Making projections regarding the future is always a dangerous activity whose difficulty increases as the time span of the projection increases. Thus making statements about the future decision-making of a Supreme Court Justice who is 50 and may well sit on the court for the rest of this century should be fraught with difficulty. Such, however, does not appear to be the situation in the case of William Rehnquist. This reversal of expectation arises from two points. First, Justice Rehnquist has developed a very clear ideology and has freely expressed it. Second, Justice Rehnquist's actions since coming to the Supreme Court strongly suggest that he does not intend to allow the institutions of the Court, its precedents and traditions, to influence him or to deter him in the promulgation of his ideology.

The specific purpose of this study is to evaluate Justice Rehnquist's position regarding freedom of speech issues and to preduct future decision-making in this area. The analysis upon which conclusions will be based will be in two parts: first, the statements of William Rehnquist on freedom of speech matters will be examined to discover his attitude toward these First Amendment rights; second, Mr. Justice Rehnquist's judicial behavior will be reviewed to see how his attitudes may be expressed in actual Court decisions.

I

In order to arrive at some understanding of William Rehnquist's views on freedom of speech it is helpful to examine the Justice's basic philosophy of law as well as his views on the specific subjects of demonstrations, surveillance, and obscenity. That basic philosophy of law has been stated as follows:

> First, that the laws shall be made and unmade in accordance with the will of the majority;
> Second, that any minority shall have full opportunity to urge its point of view in public debate of issues, and that popular elections be held regularly in order that the mandate of the voters be registered anew;
> Third, that no man be held to answer except for proven violation of an existing law; and
> Fourth, that those laws which have been duly enacted be evenhandedly enforced against all who violate them.[1]

These general principles presented in his Law Day Speech of May 1, 1969, are certainly beyond reproach. However, the application of these principles is the real question. Later in this same speech

significantly entitled, "The Law: Under Attack from the New Barbarians," Rehnquist stated, "The minority, no matter how disaffected or disenchanged, owes an unqualified obligation to obey a duly enacted law."[2] The application of this rule would make improper and unlawful sit-ins, freedom marches and anti-war protests without permit, The Boston Tea Party, and virtually all forms of draft resistance. And specifically in terms of college campus demonstrations Rehnquist added,

> I do offer the suggestion in the area of public law that disobedience cannot be tolerated, whether it be violent or nonviolent disobedience. I offer the further suggestion that if force or the threat of force is required in order to enforce the law, we must not shirk from its employment.[3]

Simply stated the Rehnquist position is that laws must be obeyed and that many of the demonstrations and other activities to protest the majority's laws and the government's policies are illegal. Therefore, it follows that the government may rightly use the means necessary to suppress these protests. This view, enunciated by a ranking officer of the United States Department of Justice, would appear to lead directly to the Kent State murders and the unconstitutional mass May Day arrests of more than 12,000 peaceful demonstrators in Washington, D.C. in 1971.

The second area of Rehnquist's ideology dealing with freedom of speech is that of surveillance by the government of those who oppose its policies. Here again the Rehnquist position is clearly seen in his development of the theory that the President of the United States has the unlimited right to wire-tap without a court order in "national security" cases. In a speech given on March 19, 1971, entitled "Privacy, Surveillance, and the Law," Assistant Attorney General Rehnquist considered the question of the "chilling effect" of surveillance on freedom of speech and concluded unequivocally that, "the First Amendment does not prohibit even foolish or unauthorized information gathering by the government."[4] This view had been fully developed earlier in appearance before Senator Sam Ervin's Constitutional Rights Subcommittee on March 9, 1970. The Senator asked Rehnquist if he agreed that surveillance which tended to stifle First Amendment rights would not have the effect of violating those rights, and Rehnquist replied, "No, I do not." Pressed further by Ervin by asked if some people were not made afraid by government surveillance, Rehnquist added:

> I do not doubt a number are, Mr. Chairman. I have noticed that certainly there have always been people willing to come forward and sue the government, as was done in the Northern District of Illinois and was done here in the District of Columbia, claiming that others were intimidated, but really admitting that they were not intimidated at all.[5]

Thus not only does Rehnquist support the government's unlimited right to engage in surveillance even where no law is being violated, but also he clearly rejects the idea that such activity might have a suppressive effect on freedom of speech.

Mr. Justice Rehnquist's views in the area of obscenity were stated and developed during the course hearings in 1969 before a House Judiciary subcommittee dealing with a Nixon administration proposal to curb interstate traffic in salacious materials, especially mail advertising. Within this testimony several interesting items appear. One gets the feeling that Rehnquist's opening statement, that he is pleased to testify for the bill, is more than just a courtesy. The overall impression is that he considers sexually stimulating material a real evil that must be stamped out. The decisions of the Supreme Court in the area of obscenity are deplored because they have placed upon the government "a very heavy, and often impossible burden of proof in proceeding against prurient advertising under present laws."[6] The bill, carrying maximum penalties of ten years in prison and $100,000 fine, that Rehnquist supported would have solved the government's legal difficulties by eliminating two of the then existing tests to prove obscenity. It would have made it unnecessary to show that the material was patently offensive to contemporary community standards and utterly lacking in redeeming social value. The government would only need to demonstrate that the material as a whole was sexually stimulating. The argument advanced for the legality of in effect rewriting the then prevailing Supreme Court definition of obscenity is interesting.

> The reason for excluding commercial advertising (and by logical extension the products being advertised) from First Amendment protection is apparent. The central purpose of the Amendment is to assure what Justice Holmes called the "free trade in ideas." ... But the purpose of ordinary commercial advertising is to sell a product, not an idea. Accordingly, such advertising ranks low on the scale of values underlying the First Amendment. It may be suppressed when necessary to promote other legitimate interests.[7]

Here the message clearly seems to be that sexually stimulating material seen as a commercial product can legally be suppressed without damaging freedom of speech.

William Rehnquist's overall position regarding First Amendment rights appeared in an article he prepared for the Civil Service Journal of January-March 1971.

> The free-speech guarantee of the First Amendment is probably the best-known provision of our Constitution.

> It is entirely proper that this is so, since the right of freedom of expression is basic to the proper functioning of a free, democratic society.
>
> Less well known, but equally important, are those restrictions on complete freedom of speech which result from the balance of competing interests in the jurisprudential scale--the need to preserve order, the need to afford a remedy to the innocent victim of libel, the need of government to govern.[8]

This statement, when combined with the views taken in regard to the specific questions of protest, surveillance, and obscenity, give a clear picture of William Rehnquist's philosophy of freedom of speech. In Rehnquist's ideology First Amendment rights have no special position in law. Rather he views freedom of speech as only one of many interests which complete and are reconciled by the legal system. In balancing competing interests, Rehnquist states that he placed great value on interests other than freedom of speech. One major value is the interest of the government in protecting itself from those who oppose its policies. Any threat to the government, real or imagined, justifies surveillance and probably suppression of protests without regard to the First Amendment. Because Rehnquist believes that society is threatened by sexually stimulating materials, they also should be suppressed without regard to the First Amendment. In sum, in William Rehnquist's ideology freedom of speech concerns appear to rank low among the interests that are to be balanced by our legal system.

II

The application of the William Rehnquist ideology to Mr. Justice Rehnquist can be seen in a series of decisions handed down at the end of his first term on the Supreme Court in June 1972. Four cases are of special interest. The first of these is Lloyd Corporation v. Tanner.[9] This case concerned the distribution of anti-war leaflets in a privately owned shopping center. The Court in 1968 had considered the right to picket in a shopping center and had ruled in a six to three decision that picketing could not be prohibited.[10] On the basis of that case the lower Federal court had issued an injunction prohibiting the shopping center from interfering with the anti-war activity. In a decision written by Mr. Justice Powell the Supreme Court vacated the injunction by a five to four vote with Justice Rehnquist joining the majority. The majority rejected the argument that since the shopping center allowed military and patriotic groups to use its facilities, the bank it sought was highly selective. Also rejected was the argument presented by Justice Marshall in his dissent that the majority position constituted an explicit reversal of the legal principle established four years earlier. The majority position was in essence that the owner of private property can use it as he sees fit. Here Rehnquist joins the court majority in placing greater

importance on the due process clauses of the Fifth and Fourteenth Amendments than on the freedom of speech clause of the First Amendment.

The second case dealt with a suit brought against the United States Army to prohibit the continuation of the Army's practice of conducting surveillance of legal civilian activities. The Army had been spying on and making reports on such things as Earth-Day rallies as well as anti-war protests. The District Court dismissed the suit, but the Court of Appeals upheld the right to sue. The case was appealed to the Supreme Court which dismissed the suit by a five to four decision. Justice Rehnquist joined Mr. Chief Justice Burger in his majority decision rejecting the idea the surveillance might have a "chilling effect" on freedom of speech using the same reasoning used by Rehnquist in his testimony before the Ervin Subcommittee two years earlier.[11]

Perhaps the case in this group that presents the most complex issues is Gravel v. United States.[12] This case is one of several that arose out of the whole Pentagon Papers situation. Senator Mike Gravel of Alaska was one of those who received copies of the papers. By using the subcommittee of which he was the chairman, he read a portion of the papers into the public record. Through one of his aides, he later arranged to have the papers in his possession published in The Beacon Press. When a Federal grand jury sought to investigate these activities and question Gravel's aide, the Senator invoked his right of Congressional immunity to shield his aide. The principle of immunity, a long-standing parliamentary concept, rests on the idea that free and full debate is inhibited if a Congressman could be subjected to legal sanctions and is codified in Article I, Section 6 of the Constitution. When this case came to the Supreme Court, the United States Senate, acting officially, joined in presenting briefs in support of Senator Gravel. However, by a vote of five to four in a decision written by Mr. Justice White the Court rejected the position taken by the Senate and interpreted Congressional immunity narrowly so that the activities in question were beyond the area protected. In this case Justice Rehnquist joined the majority in placing greater importance on the Executive branch of government's interest in preserving the secrecy of its activities ("the need of government to govern") than on the interest of the Legislative branch in full and free debate.

The last decision to be considered here involved three cases dealing with a reporter's right to protect confidential sources and unpublished data from examination by grand juries. Several grand juries engaged in general investigations had issued subpoenas for a broad range of reporter's materials and also sought to question reporters themselves. The reporter's position was that the investigative reporting needed to stimulate the free flow of

information and to keep the public informed would be severely hampered if confidentiality of sources were not protected. The majority decision written by Mr. Justice White and joined by Justice Rehnquist took the position that nothing in the freedom of speech clause of the First Amendment could possibly grant reporters immunity from testifying before a grand jury.[13] Here again Justice Rehnquist strikes his balance in favor of "the need of government to govern" as opposed to freedom of speech.

In summary, in this group of end of Spring 1972 term cases Justice Rehnquist was given an opportunity to balance the interests of freedom of speech against a variety of other interests. In every case freedom of speech was ranked below the other interest. The rights of private property were upheld, and the rights of the government, particularly the Executive branch, were treated as superior to the rights of the governed.

III

Having seen the nature of William Rehnquist's ideology and the way in which they ideology has been translated into positions in Supreme Court cases dealing with freedom of speech, let us now look at opinions written by Justice Rehnquist that seem to show a strong consistency in application of his ideology. Three examples will be used. The first example involves a pair of related cases in which Rehnquist's opinions appear to reflect ideology rather than consistent application of legal principles and reasoning. The second is a most unusual statement in the Supreme Court record known as the Rehnquist Memorandum. The third example deals with Rehnquist's opinions in a pair of 1975 obscenity cases.

The first of the two related decisions was handed down in early June 1972 and dealt with the refusal of the Harrisburg, Pennsylvania Moose Lodge to serve a black man brought into the club by a white member. A three-judge Federal District Court had ruled that Pennsylvania could revoke the club's liquor license because of this discriminatory practice. In reversing this ruling Justice Rehnquist wrote for the Supreme Court majority that the state's regulation of liquor licenses "does not sufficiently implicate the state in the discriminatory guest policies."[14] Discrimination by a licensee does not constitute a state action or involve the regulatory interests of the state. From an ideological viewpoint this decision is consistent with William Rehnquist's opposition to non-discriminatory public accommodations legislation--a view clearly stated while he was still living in Arizona.[15]

The second decision was handed down on December 5, 1972 and again involved a reversal of a lower court ruling. This case concerned efforts by the State of California to use liquor license regulation to prohibit nude entertainment in places where liquor is served. Writing for the majority Justice Rehnquist said,

> In the context, not of censoring dramatic performances in a theater, but of licensing bars and nightclubs to sell liquor by the drink, the states have broad latitude under the 21st Amendment to control the manner and circumstances under which liquor may be dispensed, and here the conclusion that sale of liquor by the drink and lewd or naked entertainment should not take place simultaneously in a licensed establishment was not irrational.[16]

In his dissenting opinion in this case Mr. Justice Marshall stated that he could not understand how the Twenty-first Amendment could in the process of balancing override the freedom of speech clause of the First Amendment but not the equal protection clause of the Fourteenth Amendment upon which the Moose Lodge had based its case. Such an observation seems to recognize only a part of the dynamics involved. It seems clear that in balancing interests Justice Rehnquist places a very low value on freedom of speech and, as was noted in the Lloyd Corporation v. Tanner case, a high value on the equal protection clause. Furthermore, William Rehnquist has recorded his ideological opposition to public accommodations regulation and sexually stimulating materials. Without regard to any consistent legal principle these two cases can be seen simply as an opportunity for Justice Rehnquist to implement his ideology. The implication seems to be that when they are in conflict, the implementation of ideology is more important than consistency or any developed system of legal principles. ——/

Second, there is the Rehnquist Memorandum, a response to the request that the Justice disqualify himself in the Laird v. Tatum case. If Justice Rehnquist had not participated in this case, the court would have been evenly split, and the decision of the Appeals Court would have been upheld. The grounds for requesting the disqualification was William Rehnquist's testimony in support of the government's position in his previously discussed appearance before the Senate's Constitutional Rights Subcommittee. While the Memorandum dealt directly only with the single case on which a petition had been presented, two other previously discussed cases fall into the same category. Rehnquist was involved with the Justice Department when the Gravel case was first being pressed and was part of the five to four majority deciding that case. Rehnquist was Assistant Attorney General when grand juries were established which subpoenaed reporters in the course of their investigation, and he voted with the five to four majority in deciding those cases. In contrast Justice Rehnquist did not participate in a case dealing with wiretapping, another case in which he had been involved in the Justice Department and on which his position had been previously stated. Without Rehnquist participating the Supreme Court in a unanimous decision supported the Fourth Amendment principle that prior judicial approval is required before initiating a search or surveillance.[17]

In the Memorandum on Motion to Rescue Laird v. Tatum, Justice Rehnquist points out that under the United States Code he is not "required" to disqualify himself in this situation. He considers the propriety of discretionary rather than "required" disqualification as a means of avoiding any appearance of conflict of interest and concludes,

> While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided court ... I believe it is a reason for not "bending over backwards" in order to deem one's self disqualified.[18]

In simple terms Mr. Justice Rehnquist is saying that it is not important for a Justice to avoid the appearance of conflict of interest particularly when such avoidance might change the outcome of a case under consideration. Since in the four cases in which William Rehnquist's role was almost identical, he chose to "bend over backwards" only in the case in which his participation would have made no difference, it can be reasonably concluded that here again is an illustration of the greater importance Justice Rehnquist apparently places on the promotion of his ideology than on generally accepted standards of judicial conduct.

The third example concerns the Hamling and Jenkins decisions, the Supreme Court's 1974 attempt to find a final solution to the obscenity problem. In 1973 the Court's five member majority in Miller v. California had substantially rewritten the definition of obscenity that had developed through a series of cases over a period of sixteen years.[19] The major shifts in the Miller decision written by Chief Justice Warren Burger reflected the previously noted position taken by Justice Rehnquist in testimony before the Senate's Constitutional Rights Subcommittee in 1969. The Court majority declared that it would no longer be necessary in obscenity prosecutions to show that the material in question was "utterly without" redeeming social value. It would be sufficient to show that the material was without "serious" artistic or literary merit. In addition the contemporary community standards should be local rather than national. In effect the Court decided that obscenity was really a question of fact for juries to decide rather than a question of law to be dealt with by the courts.

The Hamling case concerned a California prosecution of an illustrated edition of the Report of the President's Commission on Obscenity and Pornography.[20] The jury had failed to reach agreement on this work but did find an advertising brochure for the book obscene. In the trial the judge had refused to allow the defense

to present evidence regarding the standards of the local community in which the trial had taken place. Thus, Rehnquist's basic problem was to justify the majority's position affirming the convictions in spite of the ruling by the trial judge that was inconsistent with the concept of local community standards enunciated in Miller. His solutions was to ignore the issue of the evidence excluded at the trial and to point to evidence in the trial transcript indicating that the distinction between a national and local standard in this case were "confusing and often gossamer." This argument allowed the conviction to be sustained without actually breaking the legal principle developed in Miller.

In the Jenkins case a local jury in Albany, Georgia following the local standards concept of Miller decided as a matter of fact that the film "Carnal Knowledge" was obscene.[21] Although reversal of this conviction was unanimous, three different opinions were written. The majority's opinion by Rehnquist simply stated that the trial court jury was wrong. He noted that, "Miller states that the questions of what appearls to 'prurient interest' and what is 'patently offensive' under the obscenity test which it formulates are 'essentially questions of fact,'" for a jury to decide. He then proceeded to define "essentially questions of fact."

> But all of this does not lead us to agree with the Supreme Court of Georgia's apparent conclusion that the jury's verdict against appellant virtually precluded all further appellate review of appellant's assertion that his exhibition of the film was protected by the First and Fourteenth Amendments. Even though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of Miller to conclude that juries have unbridled discretion in determining what is "patently offensive."

Here again an argument was constructed to circumvent previously stated legal principles and support the action that Rehnquist wants to take. Certainly the Supreme Court's new rules on obscenity would have been subject to public ridicule had the obscenity conviction of "Carnal Knowledge" been sustained. Whatever the reason, the Jenkins case is the only case in which Rehnquist has participated and voted to support a freedom of speech concept.

In summary, these three examples indicate the degree to which William Rehnquist's commitment to his ideology will influence his opinions and decisions as a Supreme Court Justice. These examples suggest a greater commitment to the Rehnquist ideology than to generally accepted standards of judicial conduct. He has shown a willingness to support opposite positions in parallel cases when such positions are consistent with his ideology. He has shown a willingness to give the appearance of conflict of interest when

the avoidance of such appearance of conflict might jeopardize the success of the causes he supports. He has demonstrated the ability to circumvent previously supported principles in order to support positions with which he agrees.

IV

The goal of this study has been to reach some conclusions about the position of Mr. Justice Rehnquist in cases concerning freedom of speech. In this area the Rehnquist ideology is clear. He has explicitly stated his opposition to protests against the government and the whole range of activities that in an earlier era might have been classified under the general heading of seditious libel. He has stated his objection to sexually stimulating materials. He has supported the idea of government surveillance of a citizen's legal activities. And he has stated his opinion that when in the legal process freedom of speech must be balanced against other interests, freedom of speech commands a very low priority. With the single special exception of the Jenkins case, Justice Rehnquist has balanced other interests against a claim of freedom of speech. When the opportunity has presented itself for Rehnquist to further his ideology, he has done so without regard for precedent, his own consistency, or even generally accepted standards of judicial conduct.

Finally there is further evidence to suggest that the Rehnquist position is not just opposition to freedom of speech but rather reflects a pattern of opposition to most civil liberties litigation. Figures compiled by Professor Sheldon Goldman of the University of Massachusetts on positions taken by the Supreme Court Justices in cases involving civil liberties issues show that Justice Rehnquist has voted in support of the civil liberties position in only 2.9% of these cases in the 1971 term and only 2.7% of these cases in the 1972 term.[22] In sum Mr. Justice Rehnquist has shown himself to be an opponent to civil liberties in general and freedom of speech in particular.

FOOTNOTES

[1]U.S., Congressional Record, 92nd Cong., 1st Sess., 1971, E 12379.

[2]Ibid.

[3]Ibid., E 12380.

[4]Ibid., E 12385.

[5]U.S., Congress, Senate, Committee on the Judiciary, Subcommittee on Constitutional Rights, Hearings, 92nd Cong., 1st Sess., March 9, 1970.

[6]U.S., Congress, House, Committee on the Judiciary, Subcommittee No. 3, Hearings, 91st Cong., 1st Sess., September 25, 1969.

[7]Ibid.

[8]William H. Rehnquist, "Public Dissent and the Public Employee," Civil Service Journal, XI (January-March, 1971), 7.

[9]407 U.S. 551 (1972).

[10]Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968).

[11]Laird v. Tatum, 408 U.S. 1 (1972).

[12]408 U.S. 606 (1972).

[13]Branzburg v. Hayes, In Re Pappas, U.S. v. Caldwell, 408 U.S. 665 (1972).

[14]Moose Lodge #107 v. Irvis, 407 U.S. 183 (1972).

[15]William H. Rehnquist, "Letter to the Editor," Arizona Republic, June 21, 1964.

[16]California v. La Rue, 409 U.S. 109 (1972).

[17]United States v. United States District Court, 407 U.S. 297 (1972).

[18]Memorandum on Motion to Rescue Laird v. Tatum, 409 U.S. 824 (1972).

[19]Miller v. California, 413 U.S. 15 (1973).

[20]William L. Hamling v. United States, 418 U.S. 87 (1974).

[21]Billy Jenkins v. State of Georgia, 418 U.S. 153 (1974).

[22]Sheldon Goldman, "Letters," Civil Liberties Review, I (Summer 1974), 145.

THE FIRST AMENDMENT'S WEAKEST LINK: GOVERNMENT REGULATION OF CONTROVERSIAL ADVERTISING

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Libertarians customarily define the social policy underpinnings of freedom of expression as some combination of the inherent human value in sending and receiving messages,[1] the societal judgment that airing of all viewpoints will ultimately produce superior social judgments,[2] and the belief that freedom of expression is at the center of the democratic form of government.[3] For the commercial communicator, however, notwithstanding these policies, the First Amendment extends sporadic, if any, protection.[4]

This article will examine the legal basis for distinguishing commercial expression from that directed at public decision-making. Government efforts at regulating commercial speech will be discussed. Possible solutions to the inadequacy of legal safeguards in this area will then be presented.

Commercial Communication, the First Amendment, and the Supreme Court

The legal community describes litigation where the equities of the parties and the previous precedents are in conflict with a conventional wisdom: "Hard cases made bad law." This wisdom applies with full force to the original legal conflict between commercial expression and the First Amendment. The hard case was Valentine v. Chrestensen, an appeal which presented the United States Supreme Court with a clash between an ordinance prohibiting commercial advertising and a freedom of speech defense.[5]

The defendant owned a submarine which he desired to exhibit for profit. He was informed by city police that a municipal regulation forbade the distribution of advertising handbills in public parks. In response, he merely omitted from his circular mention of the price of admission, retained the description of the vessel and its location, and printed a protest against the city's denial of docking privileges for his exhibit.[6] The justices characterized his conduct as an "evasion" of a legitimate policing ordinance and warned that, if this ploy succeeded, "every merchant who desires to broadcast advertising leaflets in the streets need only append a civic appeal, or a moral platitude, to achieve immunity from the law's command."[7]

In deciding a case solely on the merits of the parties before the court, judges often ascribe reasons for their decisions which have ramifications far beyond the matter at hand. For example,

in Valentine, the Supreme Court drew the following unnecessarily absolute distinction between public and commercial communication:

> This Court has unequivocably held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.[8]

Hence, the Court's verbal overreaction to the inequitable scheme of Chrestensen resulted in a bright line of demarcation beyond which the First Amendment will not reach: advertising. Although subsequent opinions have somewhat blurred this delineation when other protected freedoms are involved,[9] the Court just three years ago used the Valentine doctrine in denying certiorari to a decision by the Third Circuit Court of Appeals which refused to apply First Amendment libel doctrines to the credit reports of a company engaged in commercial financial studies.[10]

The thesis of the Supreme Court's position on commercial speech in light of the two decades since Valentine is that communication solely for profit is not constitutionally protected while the involvement of some other fundamental right, i.e., freedom of religion or freedom of the press, should at least bring the First Amendment into consideration.[11] The difficulty with this indirection is that it leaves untouched the broad dictum in Valentine to the effect that "commercial advertising" is per se capable of absolute government regulation. Uncertainty, hence, allows legislatures and courts to completely interdict communication regarding a variety of controversial profit motivated ventures.[12]

This article will now examine one of the more striking examples of such regulation: state prohibition of advertising by family planning and abortion referral services. This type of regulation is both inconsistent with the social justification for free expression and the Supreme Court's current philosophy.

Constitutional Rights Surrounded by Silence

Fully 22 states penalize the advertising of contraceptives or abortifacients and/or commercial communication about the availability of contraceptive or abortion information.[13] Similarly, federal law prohibits the mailing of abortion information under penalty of fine and imprisonment.[14] These statutes survive despite the decisions of the Supreme Court in Griswold v. Connecticut, Roe v. Wade and Doe v. Bolton invalidating all statutes prohibiting

distribution of family planning information and clinical abortions prior to viability of the fetus.[15]

The Supreme Court's implied exception to the commercial advertising doctrine for communication regarding constitutional rights should either void these laws or strictly limit their application to regulation of the advertising for population control programs to sectors of the population which should be shielded from such explicit advertising.[16] Constitutional rights are rendered less meaningful where those who provide protected services cannot communicate to those who desire to exercise those rights.

Without communication regarding the availability and location of abortion clinics, for example, the right to have an abortion performed is largely meaningless. One commentator has concluded:

> It may be of little solace to those involved in abortion counseling to know that the dissemination of abortion information is protected by the First Amendment if the advertising of their services is not similarly protected. Nonetheless, this may be the case in certain instances. Relying on the commercial sector doctrine, courts have frequently held that advertisements and solicitations do not enjoy the protection of the First Amendment.[17]

This threat has precluded effective communication of family planning options for decades. As long ago as 1917, for example, the Massachusetts Supreme Court applied a state law vanguard of the Valentine doctrine to legitimate a statute banning advertising for contraceptives.[18] The Supreme Court of Arizona only 12 years ago refused to invalidate a statute which prohibited any publication of "a notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception...."[19] Although the court exempted articles in mass media and "person-to-person consultation" from the statute's general sweep, any information targeted at the general public which is intended to publicize particular services or contraceptive or abortifacient devices, would, according to the Arizona court, "amount to advertising and fall within the prohibitive terms of the statute."[20]

The state courts of this country, however, have not been quick to tailor First Amendment advertising theory to fit substantive law decisions promulgated by the United States Supreme Court. The Supreme Court invalidated state prohibitions on the dissemination of contraceptives and familing planning information almost a decade ago;[21] and a year has passed since the Roe and Doe decisions were announced. Yet, the Supreme Court of Virginia has only recently rejected a direct request from the Supreme Court to modify that state's interdict on abortion advertising.[22]

In Bigelow v. Commonwealth,[23] the Virginia Supreme Court sustained a criminal conviction against a newspaper editor for publishing an advertisement sponsored by a New York State abortion referral service. The Court's rejection of Bigelow's First Amendment defense rested squarely on the Valentine doctrine. Since the freedom of speech clause purportedly did not protect newspaper advertisements proffered by profit-making organizations,[24] the Commonwealth needed only to establish that some rational relationship existed between a legitimate state interest and the regulation at issue.[25] This lenient test was easily met, according to the Court, because the legislation was reasonably tailored "to insure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder."[26]

The Virginia Court's decision was appealed to the United States Supreme Court.[27] Subsequent to its abortion decisions, the Court remanded the proceeding to Virginia for further consideration in light of the newly-found constitutional protection for women seeking abortions and therapists offering them.[28] Amazingly, despite this obvious invitation to reconsider Virginia's flat denial of First Amendment protection in this area of constitutional interest, the state panel unanimously affirmed its prior decision, in effect holding that criminal penalties could be imposed for advertising facilities necessary for the exercise of constitutionally protected rights.[29]

The Virginia Court's all-consuming dependence on Valentine illustrates the inherent danger implicit in the Supreme Court's oblique attempts to undercut its commercial advertising doctrine. Regardless of subsequent decisions apparently extending the First Amendment to commercially inspired communication when that expression is adjunct to the exercise of fundamental freedoms,[30] the flat language of Valentine remains perpetually available to courts insensitive to civil liabilities. Even assuming that appellate review may become available, the impact on the communicator's freedoms is immediate.[31] The mere existence of restrictive statutes, regardless of their potential constitutional infirmity, legitimizes police harassment. The essence of communication is immediacy. In Bigelow's case, assuming the Supreme Court elects to further review it, an inestimable number of Virginia women were nonetheless confronted with unwanted pregnancies without the benefit of whatever information the New York referral service could have provided.

This article will now examine the public policies underlying the First Amendment and compare them generally with the objectives of commercial communication. For advertising directed at issues of public importance, such as the publication of information regarding family planning, there is no doubt that the policies supporting freedom of speech also support an outright overruling of Valentine.

First Amendment Protection for Advertising: A General Rationale

The dichotomy between commercial and public speech drawn by the Supreme Court originated in John Stuart Mill's early reflections on representative government. Although recognizing the importance of the individual's intellectual growth,[32] Mill and other classical democratic theorists demeaned the importance of discussion in the private sector as a mechanism of human development.[33] It was supposed that man's development was dependent largely upon his opportunity to participate in public decision making.[34]

Unfortunately for the commercial communicator, Mill's early musings have been incorporated in the freedom of expression theories of Professor Meiklejohn and subsequently in the decisions of the Supreme Court. Since the starting point for political freedom is self government, Meiklejohn reasons that the First Amendment exists only to protect "the freedom of those activities of thought and communication by which we 'govern.'"[35] According to Meiklejohn, then, the First Amendment extends, and extends absolutely, to all matters which might aid the citizen "in the voting booth."[36]

To the well-deserved comfort of those engaged in public discourse, the Supreme Court of the United States has accepted the essence of Meiklejohn's theories. Beginning with two decisions in its 1964 term,[37] the court overtly recognized that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[38] Upon the foregoing authority, it surely must be conceded that the "central meaning" of the First Amendment is the right to self-government.[39] Nonetheless, to argue, as does Meiklejohn, that this constitutional protection is strictly limited to public concerns is to divorce from First Amendment protection such vital aspects of free expression as literature, the arts, and academic studies.[40]

A more contemporary view of democracy than that of Mill, advanced by Professor Muller, holds that:

> The natural end for man ... is the realization of his distinctive potentialities as an animal with the power of mind or conscious life. It is the development of this capacities for knowing, feeling, making, striving; the extension, enrichment, and refinement of consciousness,[41]

At a minimum, contemporary democratic theory compels recognition, that "large areas within existing so-called private centers of power (like large commercial corporations) are political and therefore potentially open to a wide and democratic sharing in decision making."[42] At a maximum, this expansive, yet seemingly

correct, conception of liberty "implies power to expand the choice of the individual of his own way of life without imposed prohibitions from without."[43]

Assuming the legitimacy of these more contemporary theories on democracy, there should be no philosophical barrier preventing a general abandonment of the Valentine doctrine by the Supreme Court. In its pursuit of the general welfare, government has an obligation to assist, or at least not hinder, its citizens in their achievement of satisfactory material progress.[44] Advertising is a necessary concomitant of this material progress.[45] Economists, like Pigou, have long recognized the developmental function of commercial communication:

> /A/ social purpose /is performed by advertising/ in informing people of the existence of articles adapted to their taste.... Without it many useful articles, such as new machines or useful services ... might not be brought at all to the notice of potential purchasers who have a real need for them.[46]

The theoretical notion of Pigou to the effect that advertising of consumer goods and services is fundamental to human welfare has practical support as well. One survey has indicated that an average American family spends a much larger portion of its time and resources and derives a larger percentage of its daily satisfaction from the act of consuming than from "political participation," however expansively that term is defined.[47] Advertising certainly facilitates a flexible allocation to individuals of resources necessary to the free enterprise economy in the United States.[48]

One commentator has argued that "/c/onsumer behavior in the marketplace is not rational and deliberate, but often impulsive and capricious..."[49] This criticism, directed largely at advertising which merely entertains rather than communicates information, assumes that speech must have empirical or objective content to be protected. An examination of the Supreme Court's recent decisions in the First Amendment area refutes this thesis.

In one case, the Court applied and expanded its First Amendment "public figure" defense in libel actions to encompass a largely inaccurate story about a family held hostage by escaped convicts.[50] In another case, the Court reversed a judgment under a state right-to-privacy statute against the publisher of a highly fictionalized biography of a baseball pitcher on the ground that he was a "public figure."[51] The informational content of these two publications was concededly largely false. It is ludicrous to argue that either the besieged family or the sports figure were bound up in the electoral process. Yet, because freedom of the press was involved and because the publications in issue purported to advertise no product or service for sale, the First Amendment was held to extend its protection to them.

The entertainment-information distinction is unsound on a more fundamental basis. To argue that commercial advertising should not be protected because it stimulates "impulsive and capricious" behavior while espousing freedom for the political communicator is to ignore the basic similarity in these forms of speech. Most American voters reach their decision on irrational grounds.[52] In turn, the goal of the modern politician is to appeal to the voters' subconscious desires and beliefs.[53] If there is a distinction to be drawn between commercial and political expression, that demarcation cannot be made upon an analysis of the goals of freedom of expression, the American democratic model, or generalities about the content of such messages.

Controversial Commercial Communication and the First Amendment: A Limited Approach for Fundamental Freedoms

Two federal courts have attempted to deal with the unwarranted disparity in First Amendment protection between political and commercial communication. In Michigan, a trial court simply employed the "clear and present danger" doctrine to hold that billboard advertising by a New York family planning service did not create so substantial a probability that the laws of that state would be transgressed as to justify total prohibition of such communication.[54] This approach, while reaching a meritorious result, proceeds on an unstable premise. The court incorrectly assumed that the First Amendment protected all commercial billboards and then applied a test created only to weigh governmental efforts at suppressing the entire content of speech rather than for adjudging regulation of the method of communication.[55]

A more useful approach was taken by the Fifth Circuit Court of Appeals in Hiett v. United States.[56] There, the court confronted a prosecution under a United States statute forbidding use of the mails to distribute written material "giving or offering to give information concerning ... how... a divorce may be secured in a foreign country and ... solicit/ing/ business in connection ... thereof."[57] The Fifth Circuit adopted a position on regulation of commercial speech which the Supreme Court has avoided subsequent to deciding Valentine:

> There can be no doubt that the statute infringes on some expression .... We do not find that information about the exercise of legal rights, even when it relates to the procurement of a divorce in a foreign country, may be summarily censored 'without raising any constitutional problem' in the same manner as obscenity, fraud, libel, or threats ...."[58]

Instead of dismissing the defense by cursory reference to the commercial communication doctrine, the Court of Appeals found that some state regulation "by a statute drawn with narrow

specificity and aimed at protecting only overwhelmingly important interests" would be permissible.[59] Then, applying stricter standards of statutory construction because the statute had a potentially inhibiting effect on protected speech, the court balanced the encroachment on free expression against the public interest and, although finding that solicitation went beyond the realm of "pure" speech, the court nonetheless invalidated the statute on constitutional grounds. The reference to the "pure-nonpure" dichotomy was an allusion to a line of decisions holding that speech when combined with nonspeech activity has lesser First Amendment protection.[60]

Although the Fifth Circuit did not amend the Valentine doctrine directly, it cited that decision in passing, indicating that the court was aware of its existence but was unpersuaded by it. Certainly Mr. Bigelow would have been happy with even the minimal First Amendment protection extended by the Hiett decision. In its frank recognition of the compatibility of commercial communication and freedom of expression, Hiett is indeed commendable. Defining solicitation as an activity beyond "pure" speech, however, was an unwarranted attempt at judicial compromise.

The compromise fails on both logical and pragmatic grounds. The "pure-nonpure" test was born of cases where the purported non-speech activity was conduct such as picketing or flag-burning. It is, thus, a standard for analyzing symbolic communication. The advertisement in Hiett was, by any definition, pure communication and any attempt to claim that "solicitation" is more than speech strains logic.

The test announced by the Fifth Circuit, at a functional level, still permits substantial government regulation despite the involvement of the First Amendment. Since the limits of regulation of "non-pure" speech are still uncertain, it is conceivable that this approach to commercial communication could yield little more protection to the commercial communicator than the lenient due process approach employed in Bigelow.

A more direct attack on the problem would be a direct overruling by the United States Supreme Court of its unnecessarily broad language in Valentine. Traditional First Amendment doctrines could be employed to police false advertising, advertising directed at those of tender sensibilities, or the medium through which the message is communicated.

If this general approach is not adopted by the Supreme Court, it should at least directly announce the presumption upon which some but not all post-Valentine decisions have proceeded: a freedom of expression defense is accorded to communicators involved in transmitting messages related to the exercise or protected rights.

This limited extension of the First Amendment, actually a clarification of existing doctrine would prevent absurd results like that in Bigelow while continuing to allow reasonable government regulation of clearly less meritorious speech.

CONCLUSION

Government regulation of the transmitting and receiving of messages by definition interferes with the natural operation of a society's communications process. The United States has extended open protection against this interference only to utterances directly relating to public decision making. Paradoxically, a far more extensive network of messages, commercial communication, receives covert protection, if that, from the Supreme Court.

This inadequacy should profoundly concern those involved in the study of human communication. Traditional scholarship has nonetheless focused on describing the "role of law" rather than presenting academic justifications for reform of aberrations in First Amendment theory.[61] Sociologists have contributed to the Supreme Court's education decisions, political scientists to voting rights cases, and physicians to the Roe and Doe holdings. The question of constitutional protection for commercial communicators is ripe for intervention by communications theorists.

The communication of information regarding the availability of consumer goods and services is important to human development. The First Amendment should protect clearly this type of expression, especially as it facilitates the exercise of other constitutional rights.

FOOTNOTES

[1]See, Marsh v. Alabama, 326 U.S. 501 at 504-05 (1946); cf., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 at 390 (1969).

[2]Mr. Justice Holmes in Abrams v United States, 250 U.S. 616, 630 (1919) incorporates this rationale in analogizing free expression to a "market-place of ideas." See also J.S. Mill, On Liberty at ch. 2 (1859).

[3]Meiklejohn, The First Amendment Is An Absolute, 1961 S. Ct. Rev. 245 at 256-57 (1961).

[4]Yale Professor Thomas Emerson has concluded:

> "Communications in connection with commercial transactions generally relate to a separate sector of social activity involving the system of property rights rather than free expression."

T. Emerson, Toward a General Theory of the First Amendment, 105, n. 46 (1966).

[5]316 U.S. 52 (1942). The Court had previously reversed the convictions of religious or political advertisers under statutes which either forbade or required the licensing of handbill distribution. Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[6]316 U.S. at 53.

[7]316 U.S. at 55.

[8]316 U.S. at 54. Subsequent teaching on Mr. Chrestensen's case has criticized the "casual, almost off-hand" manner which the Court dismissed all First Amendment protection for advertisers. Cammarano y. United States, 358 U.S. 498 at 514 (1959) (Douglas, J., concurring).

[9]Only two years after Valentine, the Supreme Court held that a municipality could not apply a license tax exclusively to evangelists who earned income from selling religious articles. Murdock v. Pennsylvania, 319 U.S. 105 (1943). In Burstyn v. Wilson, 343 U.S. 495 (1952), the Court rejected the argument that motion pictures distributed for profit were not covered by the First Amendment. Although the famous civil rights advertisement in New York Times v. Sullivan, 376 U.S. 254 (1964), solicited donations, the decision there created significant protections against libel prosecutions.

[10]See, the dissenting opinion of Douglas, J. from the denial of certiorari in Dun & Bradstreet, Inc. v. C.R. Grove, 404 U.S. 898 (1971). See also, Smith v. Goguen, Slip Opinion of March 25, 1974 at 5 (White, J. concurring).

[11]The Supreme Court apparently feels that the mere presence of some commercial benefit to the communicator will not completely block the application of the principles of freedom of expression if some external fundamental right is being asserted in the process. See, Thomas V. Collins, 319 U.S. 105 (1943); Follet v. McCormick, 321 U.S. 573 (1944) (freedom of religion advanced by commercial solicitation); and Beard v. Alexandria, 341 U.S. 622 (1951) (offering periodicals for sale doesn't preclude the application of the First Amendment). The difficulty is that these opinions assume the Amendment's applicability without discussing Valentine.

[12]See, text and cases accompanying note 10, supra.

[13]These states are Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

[14]18 U.S.C. § 1461 (1970) provides for fines and possible imprisonment of up to 10 years for second offenders.

[15]381 U.S. 479 (1965), 410 U.S. 113 (1973); 410 U.S. 179 (1973).

[16]For example, there is no First Amendment difficulty implicit in precluding adult-oriented advertising in children's publications. The Supreme Court has long held the position that reasonable public welfare regulations which do not effectively stifle all communication of a given idea are constitutionally permissible. See, e.g., Kovacs v. Cooper, 336 U.S. 77 (1949). Despite some authority to the contrary discussed infra, governments could also probably regulate the media through which such information is disseminated, such as prohibiting billboard advertising of contraception and abortion referral. See, St. Louis Poster Advertising Co. v. City of St. Louis, 249 U.S. 269 (1919); Markam Advertising Co. v. State, 73 Wash. 2d 405 (1968).

[17]Messerman, Abortion Counseling, 23 Case West. Res. L. Rev. 810 at 817 (1972).

[18]Commonwealth v. Allison, 227 Mass. 57 (1917).

[19]ARIZ. REV. STAT. ANN. § 13-213 (1956).

[20]Planned Parenthood Committee v. Maricopa County, 92 Ariz. 231 at 238 (1962).

[21]Griswold v. Connecticut, supra, n. 15.

[22]The specific section of the Virginia Code under which this prosecution proceeded has been amended to preclude only advertising for illegal abortions performed in state. VA. CODE ANN. 18.1-63 (Supp. 1972). At the time of the decision discussed in this article, all abortion advertising, including solicitation for legal out-of-state clinics, was proscribed. VA. CODE ANN. 18.1-63 (1960).

[23]213 Va. 191 (1972).

[24]213 Va. at 193-95.

[25]213 Va. 195 196. This test, drawn from Williamson v. Lee Optical, 348 U.S. 483 (1955), is the customary standard whereby legislative enactments not involving constitutional rights are measured against the due process clause of the Fourteenth Amendment. When the state selects a goal to be pursued by a particular enactment, the enactment must only have some logical connection with the goal. The goal need not be a sound social policy. The enactment need not be the best route to achievement of the goal, only a measure rationally moving in that direction. By comparison, for a state to wholly prohibit a form of protected communication, it must establish that the communication constitutes a "clear and present danger" to society. Schenck v. United States, 249 U.S. 47 at 52 (1919).

[26]213 Va. at 196.

[27]This appeal was not granted certiorari; the case was returned for further consideration because of Roe and Doe. It is unclear whether the Court will allow an appeal now that the state system has again affirmed Bigelow's conviction.

[28]93 S. Ct. 3057 (1973).

[29]214 Va. 341 (1973).

[30]See, note 11 and accompanying text.

[31]A recent report commissioned by the Chief Justice of the United States has concluded that the caseload of appellate courts and especially the Supreme Court has become unmanageable. Report of the Study Group on the Caseload of the Supreme Court (1972). The threat of criminal prosecution, moreover, has been found to have a 'chilling effect' on the exercise of free expression. See, Dombiowski v. Pfister, 380 U.S. 479 (1965).

[32]Mill, Considerations on Representative Government, 203 (1882).

[33]See generally, Davis, Contemporary Restatement of Democracy, 18 West. Pol. Sci. Q. 37 (1964).

[34]Bachrach, The Theory of Democratic Elitism 5, 98 (1967).

[35]Meiklejohn, n. 3 supra, at 253-55.

[36]Id. at 255.

[37]Garrison v. Louisiana, 379 U.S. 64 (1964) and New York Times v. Sullivan, n. 9. supra.

[38]379 U.S. at 75

[39]Kalven, The New York Times Case: A Note on 'The Central Meaning' of The First Amendment, 1964 S. Ct. Rev. 191 (1964).

[40]Meiklejohn, Political Freedom 24 (1965). See also, Chafee, Book Review, 62 Harv. L. Rev. 891, 896 (1949).

[41]Muller, Issues of Freedom 50 (1960).

[42]Bachrach, n. 34, supra, at 102.

[43]Laski, Liberty in the Modern State 2 (1930).

[44]Charington, People's Wants and How to Satisfy Them 4 (1935).

[45]Brown, Advertising and the Public Interest, 57 Yale L.J. 1165 at 1168 (1948).

[46]Pigou, The Economics of Welfare 196 (1962).

[47]Wall Street Journal, December 11, 1969 at 1.

[48]Kinter, FTC Regulation of Advertising, 64 Mich. L. Rev. 1269 at 1270 (1966); see generally, Baumol, Economic Theory and Operations Analysis 248-56 (1961).

[49]Developments in the Law--Deceptive Advertising, 80 Harv. L. Rev. 1005 at 1010 (1967).

[50]Time, Inc. v. Hill, 385 U.S. 374 (1967).

[51]Julian Messner, Inc. v. Spahn, 387 U.S. 239 (1967).

[52]Campbell, Converse, Miller & Stokes, The American Voter (1960).

[53]McGinnis, The Selling of the President--1968 (1969).

[54]Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738 (E.D. Mich. 1972).

[55]See n. 6, supra. See also, Gibboney v. Empire Storage & Ice Co. 336 U.S. 490 (1949). Reasonable regulations of speech (e.g., controlling the medium or audience for a transmission) can be justified if they are narrowly drawn and do not so effectively constrict communication that the right to free speech is in practical effect substantially impaired.

[56]415 F.2d 664 (5th Cir. 1969).

[57]415 F.2d at 669.

[58]Id.; See n. 6, supra.

[59]415 F.2d at 672-73.

[60]See, e.g., Street v. New York, 394 U.S. 576 (1969).

[61]See e.g., O'Neill, Free Speech at v. (1966).

GAINING ACCESS TO THE MEDIA: SOME ISSUES AND CASES[1]

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Speakers, whether minority representatives, average citizens, or congressmen, are guaranteed rather large freedoms of expression, with both what they can say and how they can say it. However, speakers have no guarantee that their talk will reach the American public. To reach many listeners, the speaking voice needs the amplification of the mass media. In an era when many issues significantly affect persons in all sectors of the country, speakers increasingly want access to the mass media's audience. The mass media seem equally determined to retain their discretionary power over what they print and what they broadcast. Ironically, both the proponents and resistors of guaranteed media access claim a profound commitment "to the principle that debate on public issues should be uninhibited, robust, and wide-open."[2] One insists that debate will be wide-open only if more persons are provided access to the media; the other insists that only through protecting the media's discretionary powers will debate remain wide-open.

Speech Communicologists have interest in the plight of the speaker seeking an audience and rights of the mass media protected by the First Amendment. A critical look at the cases made for and against a right to access uncovers the issues involved and suggests three departure points for analysis: from the view of the listener, the speaker, and the media.

I. Cases For and Against Media Access

One need not look far to find examples of media access seeking. A group of businessmen organized against the Vietnam war demanded the right to air their views in one-minute broadcast editorials.[3] Clothing union members proposed to buy a page of advertising space in a metropolitan daily newspaper to protest importation of foreign-manufactured clothing.[4] Individual citizens insisted that they be allowed to use the origination facilities of their community's cable television system to express their personal views on any subject.[5] Each case met media resistance. Each case sought relief in court. Access proponents argue for action forcing the mass media to provide more speaking opportunities for those without their own broadcasting and printing facilities.

The argument is begun with a conclusion: the marketplace of ideas concept of democratic proceedings today is not appropriate; it is "romatic." A true marketplace suggests diverse wide-open

debate, free discussion, presentation of viewpoint, and most important, opportunity to speak, to reach listeners. According to Jerome Barron, "the marketplace of ideas view has rested on the assumption that protecting the right of expression is equivalent to providing for it.[6] It is the provision for expression that is largely nonexistent today. Also stressing the difficulty of getting one's views expressed in the media, Samuel L. Becker asks us to address the question, "Is there a free marketplace of ideas in the United States today?"[7] Access proponents would have us believe that the mass media deliberately avoids controversy, reducing points of clash.[8] Their most compelling argument is that newspapers today are consolidated, forming monopolies. In 1909, over 10,000 newspapers were published compared with some 1,749 today.[8] In 1900, fourteen English language dailies were published in New York City, only two morning papers and two afternoon dailies survive (1967).[9] Many American cities are one newspaper towns. In addition, ownership increasingly overlaps between radio, television, and press outlets. Several stations and newspapers are often under the same management. Big chain newspapers providing news to many cities and the use of wire services both insure that access is more difficult for persons seeking "local access to local media to reach the local population."[10] Where estimates suggest that the investment required for a new newspaper in a medium-sized city is several million dollars,[11] it is unlikely that newspapers will spring into existence. The monopoly seems destined to remain. Other available media (sound trucks, pamphlets, soap box in the park, etc.) do not discount the need to acquire the audience only the media can provide.[12] The soap box is not the newspaper, the sound truck not the radio. "The test of a community's opportunities for free expression rests not so much in an abundance of alternative media but rather in an abundance of opportunities to secure expression in media with the largest impact."[13] Sit-ins, demonstrations, outbreaks of violence often evidence attempts to gain media coverage.

Besides developing monopolies, newspapers and broadcasting are accused of developing interests far afield from those of the public. M.O. Key pictures the media as commercial enterprises, not public service institutions:

> They sell advertising in one form or another. Only incidentally do they collect and disseminate political intelligence .... If they make their facilities available to those who advocate causes slightly off color politically, they may antagonize their customers. Newspaper publishers are essentially people who sell white space on newsprint to advertisers. In large part they are only processors of raw materials purchased from others.[14]

Commercial interests conflict with the public's interest. Access proponents argue that the press should be accountable to the public as are broadcasters:

> Traditional First Amendment thinking has long held that the print media are unlike the broadcast media in that the latter are uniquely scarce: anyone may establish a printing press; broadcast frequencies, on the other hand, are drawn from the limited electromagnetic spectrum and therefore must be regulated to avoid chaotic interference.[15]

Unlike publishers, broadcasters have long been subject to the "Fairness Doctrine," the requirement that they provide a balanced treatment of controversial public issues.[16] As Robert O'Neil pointed out, "Clearly, there will always be more applicants for licenses than there are frequencies to be assigned. Some criteria for the granting of licenses must be followed."[17] Applicants must present evidence that their programming will "serve the public convenience, interest, or necessity" before licenses will be issued or reissued. The Federal Communications Commission has ruled that "freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues ... the public interest--not the private--is paramount."[18] In addition, Section 315 of the Federal Communications Act provides that if a radio or television licensee makes his facilities available to any candidate for a public office, "he shall afford equal opportunities to all other such candidates for that office of the use of such broadcasting station."[19]

Since the number of radio and television stations is physically limited in any community, broadcasters are required to be sensitive to public needs. Access proponents argue that since the press holds a monopoly position in many communities, since the cost of creating new newspapers is extreme, and since there are three times the number of radio stations than newspapers--yet air-waves are limited and subject to regulation--so should the press be regulated to serve the public's interests. Since newspapers and air-waves are limited, something similar to the Fairness Doctrine should be enacted to impel the press to "provide space on a nondiscriminatory basis to representative groups in the community."[20]

A final argument for access to media remains. First Amendment protection is available when "state action" via laws interferes with personal behavior. Access proponents argue that in effect media monopolies form private governments possessing vast power. This power is as threatening as governmental intervention and needs regulation. In its endeavor to ensure free expression, government has provided the press with inordinate censorship power over persons seeking the media's audience. Tax breaks and failure to break up press monopolies constitute "state action" favoring the media, and subject them to regulation.[21]

Access proponents gear their proposed solutions toward the press: extend the Fairness Doctrine philosophy from broadcasters to publishers, open those parts of the newspaper which maintain only the pretense of openness.

Barron drafted a Bill to be made Law, introduced by Congressman Feighan in the House of Representatives on August 12, 1970, called the Truth Preservation Act. The Bill was referred to the Committee on Interstate and Foreign Commerce. Under the bill's provisions, newspapers must (1) publish all editorial advertisements submitted to it on a nondiscriminatory basis if all other newspapers in the community were requested to publish the ad but refused, and (2) provide a right to reply to individuals or organizations who were subjects of editorial comment if the subject can pay the ad rate and if space in the newspaper is available.[22] Other suggestions not included in the Bill would make the letters-to-the-editor section of the newspaper open to the public without media censorship and would establish an independent nongovernmental citizens advisory committee to inform the media when competing views have been denied access.

Some criteria are available to judge newspaper decisions. Where many access seekers represent the same view, was at least space provided to a "responsible representative"? To what degree does the access seeker represent a significant sector of the community? To what degree have the access seeker's views been actually suppressed by the newspaper? Is the newspaper the only daily serving the community?[23] The problem remains that newspapers could deny access by claiming lack of space.

Access resistors, especially newspaper publishers, are unmoved by the arguments and solutions advanced above. They concede that newspapers today have gained some monopoly status. They argue that wide-open debate should be encouraged. But they say that granting access without publishers' approval is tantamount to governmental interference, censorship, and direct hinderance of newspapers' fundamental rights.

D. Michael Stroud argued that newspapers, unlike the air-waves, are not necessarily limited.[24] Because only a few persons can be granted licenses, they hold the public's trust, must serve the public's interest. Not so with the press. The newspaper industry is open to all those who choose to enter it. Lange noted that access proponents assume the mass media, just because of its audience size, has more impact that other forums (i.e. pamphlets, billboards, lecture halls). Research gives no evidence of the media's overriding impact over other mediums. Moreover, Lange argues, the Fairness Doctrine concept of balance is foreign to the history of the press. Press protection has traditionally encouraged unhampered, passionate, partisan discourse inviting those who disagreed to publish counter views and arguments.[25]

The press provides a viable means to voice the newspaper owner's opinions, not a means to reflect the views of every organization or every individual on any topic.

Access resistors hold that newspapers are privately owned. Agreements between publishers and advertisers are private contracts.[26] Denying ad space is private action, not "state action," hence not subject to regulation.

The argument continues. If newspapers were required to provide space to those with views to expound, they would become mere channels without focus, without a cohesive argument and unified stance on an issue. Newspapers could not afford the tremendous cost of providing space to every comer with a view to express. A right to have access through paid advertisements might result in domination of the media by the affluent.[27] A right to reply law would discourage newspaper attacks on public figures since space would have to be provided for reply at the paper's expense. Controversy would be avoided, not encouraged. Providing access may broaden existing views, but radical groups would still be excluded in practice. Because anti-establishment speech, by nature, counters existing limitations or statutes (i.e. obscenity, clear and present danger, etc.) access will still be denied. Being the only few cut off, these persons may feel all the more unheard.[28] Private interests would no longer deny access. In effect, (private) government action would deny access and the circle is complete.

Rather than a new interpretation of the First Amendment, access resistors advocate encouraging new newspapers to appear through increased tax breaks, foundation funding, reward for non-staff editorials, and other financial incentives.[29] Access resistors intend that these suggestions apply to the broadcasting industry as well. With the advent of cable television, new possibilities arise which could lift the burden of public trust from broadcasters. Each house may easily receive at least twenty channels from the same system. Systems with a capacity of fifty-four channels are now being built. With the promise of cable television, broadcasters and publishers can both again entertain "unhampered, passionate, partisan discourse."[30]

II. Three Perspectives

Access to the media may be viewed from at least three perspectives: the listener--who is the target of the speaker and of the media, the speaker--who is attempting to gain access to the media, and the media--who command the massive audience.

LISTENER PERSPECTIVE

Issues concerning the listener include his right to be informed, his right not to listen, and his right to privacy.

Right to be informed. The right to free speech was framed by the constitutionalists with the individual and the good of society in mind. The marketplace of ideas concept is basic to a democratic society. If all ideas are expressed, and if heard fairly, right choices will become evident. One function of speech is to inform the audience, to provide alternative ideas. Freedom to speak, for some, is "better described as freedom to hear."[31] The importance of hearing, to be informed, is emphasized.

When some persons are denied access to the media, other persons may be denied their right to be informed. The right to be informed is hindered when some ideas are crowded out due to mass coverage of other ideas. At times, allotments for recognition of ideas depends on the quantity of backer money (i.e., a well-funded issue can buy television and radio time, newspaper and billboard space, etc. in larger quantity than can a less well-funded concern) Knepprath found money concerns relevant to lobby groups and legislatures. "Everybody has free speech, but some people have freer speech from the standpoint of equality of opportunity to influence legislation. And those who have not only plenty of time and money but the attentive ear of well-placed legislators have the freest speech of all."[32]

According to Nilsen, the speaker "takes on the duty of presenting such information as will enable his listeners to exercise the right of significant choice."[33] Free speech is based on the importance of individual choice--not coercion. An issue arising from this argument is, what are the boundaries of persuasion? When do "persuasive" acts become coercive in nature so that people are forced to listen or that media feel compelled to report these "persuasive acts," thus giving access seekers their wanted audience. The listener view is concerned with information gain, with choices with intelligent decisions. The inherent right is the right to hear; the right to be informed.

Right to not listen. The listener has the right to be informed, the right to hear, but also the right to not hear, the right to not listen. Becker would agree with Barron that "confrontation of ideas ... demands some recognition of a right to be heard as a constitutional principle.[34] But this view conflicts with a right to not listen. Should listeners be forced to listen; held captive in the name of providing a speaker an audience? Once an audience is formed, must they give the speaker undivided attention?

Addressing this issue, the California Supreme Court stated, "Speakers who express their opinions freely must run the risk of attracting opposition; they cannot expect their opponents to be silenced while they continue to speak freely."[35] In Cox v. Louisiana, Justice Hugh Black supported listener rights:

> The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly where the people have a right to be for such purposes Were the law otherwise, people on the streets, in their homes, and anywhere else could be compelled to listen against their will to speakers they do not want to hear.[36]

For example, former President Nixon made his first public appearance since making public the edited transcripts of Watergate tapes on May 3, 1974, to a by-invitation-only crowd of 13,000 at a Republican rally in Phoenix Coliseum. While the great majority in the audience seemed friendly, the persistence of heckler's jeers and hostile shouts prompted Nixon to remark that "the American right of free speech carried with it the responsibility to keep quiet while someone else is talking."[37] According to Justice Black, Nixon's response denies the right of the listeners to interact in the dialogue through heckling. Nixon at once demanded that he have a right to his audience and that the hecklers not have a right to their audience. Despite Nixon's wishes, via symbolic behavior, the hecklers commanded access to the media's audience.

Responsibility is placed on the speaker. If he wants an audience, it is his job as a rhetor to attract listeners. He does not have the right to be heard; he must create the need to be heard. Redfield stressed this point:

> When the Commission of the Freedom of the press was discussing these questions, Mr. Hocking remarked that to make speech free and listening compulsory would hardly do, although that would be the speaker's dream. Mr. Hutchins replied that this is doubtless why men become professors. Mr. Hutchins was thinking of the young people who more or less dutifully troop to attend lectures. The professor has a sort of captive audience. The best situation for freedom of speech is the soapbox in Hyde Park; the speaker is quite free to speak, but whether or not he has an audience depends entirely on whether he can attract one.[38]

Right to privacy. A third concern of listeners relating to access to the media is for their own personal privacy.[39] May rights of one man's privacy be set aside so that others may gain access to the media? Advocates of the privacy issue cover a broad spectrum of opinion.

Mayer specified four classes of protected privacy. (1) unjustifiable infringements on the solitude of the individual, (2) exploitation of personality for commercial purposes, (3) the placing of an individual in a false light by a misrepresentation of his status or personality, and (4) the public disclosure of essentially

private facts.[40] Rice included privacy as one of society's natural laws.[41] Chaffee argued that "great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires .... A man's house is his castle ...."[42] Kamin goes as far as to value privacy above freedom of speech: "In the constitutional value scale, the quiet enjoyment and privacy of residential premises--even of the privately owned homes of public officials--merits a higher priority than freedom of speech."[43]

When Dick Gregory led picketers into the residential area of Chicago where Mayor Daley lived in August of 1965, the issue was one of privacy. He and the other marchers were condemned on the grounds that "a man's house is his castle" and that such an intrusion was an invasion of the mayor's privacy, his family's and neighbors'."[44] But Gregory's actions were perhaps the only means of gaining media coverage.

The protection of privacy was broadened to include private property in Lloyd Corp. v. Tanner.[45] The Supreme Court set back the rights of individuals to express their political views by using someone else's private property, emphasizing the availability of adequate alternatives to publicize political views. The Court ruled that private shopping centers may prohibit leafletting protesting the war in Vietnam. Regarding this recent decision about private shopping centers, Kane concluded that "the law today upholds the prohibition of virtually all First Amendment activity taking place within the shopping center owner's permission."[46] By denying leaflet distribution, access to an audience through a print medium was denied.

Rights of privacy are being upheld, perhaps with a loss of free speech rights. These will be considered under the speaker's perspective. As listeners, we may be concerned for our rights relative to media access. Listener concerns include: the right to be informed, the right not to listen--or to be compelled or coerced to listen, and rights of privacy--privacy of the home, neighborhood, and privately owned commercial property.

SPEAKER PERSPECTIVE

A delicate balance of rights is needed so that listeners may maintain their freedoms, while speakers are still guaranteed their rights to speak freely. Sometimes these clash. To maintain an open robust atmosphere for expression is in the interest of listeners, who have the right to be informed, and speakers, who do the informing. A second concern of speakers is the protection of speech acts which are persuasive in intention. What speech or speech acts are allowable for gaining access to media? What persuasive conduct may be used to gain an audience, live or through the media?

Symbolic Conduct to Gain Media Access. Attempts to gain media access illustrate the commanding power of the media to obtain an audience and the diversity of conduct used to gain that audience.

Benson and Johnson analyzed the strategies and goals used at the October, 1967 Washington, D.C. protest against the war in Vietnam. Expectations of participants ranged from assembly for speeches to non-violent civil disobedience to resistance. Interviewing participants, most of whom coulnd't have heard the speeches if they had wanted to, Benson and Johnson concluded that the speeches given were seen as "alot of rhetoric we've heard so many times before." The event could be viewed as a nationwide televised debate.[47] Recognition via media was more important than the immediate rhetoric. Windt viewed symbolic conduct as a means for gaining access to media:

> Lacking the instruments of power available to those conducting the (Viet Nam) war, demonstrators had to rely on public opinion fashioned through speeches, signs, flags, lectures, teach-ins and whatever other methods could be improvised. Lacking access to television and newspapers, they had to create forums and devise means for attracting publicity.[48]

The power of the media as commander of an audience is obvious. Means og gaining access to that audience include diverse acts of symbolic conduct.[49] Two issues emerge: What is "speech"? That is, what of symbolic conduct is considered speech under the First Amendment? Secondly, what "speech" is allowable (i.e. not limited by the Court)? Whatever is considered "speech" and thus protected by the First Amendment, is allowable for obtaining access to the media. The intention of obtaining access is a subsidiary consideration. Free speech is protected regardless of the intentions of the speaker. Once "speech" is defined more broadly the real question becomes: What of "speech" is generally limited? This tells us what limitations are placed on "speech" for the purposes of obtaining access to media.

What Is "Speech"? Several attempts have been made at distinguishing "speech" acts from "non-speech" acts. Haiman deals with a distinction between "pure speech" and "conduct."[50] Bosmajian attempts a distinction between rhetorical activity and conduct which is revolutionary.[51] The question underlying these attempts, and the big question before the courts remains: what is "speech"?

Examples of past cases testing symbolic conduct as speech including picketing, sit-ins, flag salutes, draft-card burning, show just how fuzzy the issue is, how contradictory the decisions have been. Other symbolic actions considered by the Court in the past include obscenity, wearing of armbands, leafletting, wearing flags, wearing military uniforms, burning American flags, refusal to salute

the flag in school.[52] A summary of decisions again shows variety. Picketing and leafletting are not permitted on private commercial property, deemed less than "speech."[53] Obscenity decisions have been left to individual states and communities. Students may wear armbands as expression of opinion.[54] The Court upheld the wearing of military uniforms in skits presented in front of armed forces induction centers, supporting the actor's right to openly criticize the government.[55] Students may distribute pamphlets outside the school premises and inside the school, if such distribution is not disruptive.[56] In a flag-burning decision the Supreme Court reversed a New York Court of Appeals decision convicting the defendant of publicly mutilating the flag. The defendant had burned the American flag in protest of the James Meredith shooting. The decision was overturned on the ground that the original conviction was based on words the defendant spoke rather than his actions.[57] The decision is ambiguous--a decision on a clear-cut case of flag-burning was averted. The Court "seemed unwilling to impose special restrictions on the regulation of such conduct ... while denying protection to non-verbal speech beyond due process ...."[58]

Courts and others have a wide range of opinions concerning what is considered "speech." A working definition of free speech is needed.[59] The question, "What is 'speech'?" is important in light of determining what actions are available as "speech" for gaining access to media.

> Symbolic conduct is an exceptionally vivid means of communication. It is more intensely emotional than the spoken or written word or the traditional cool art forms. Its dramatic effect is a substitute for the protestor's lack of access to the more traditional mass media. The illegal act of burning draft cards, done at mass rallies in a city park, creates news and assures press and television coverage for the "speaker's" views. The same voice would be lost in obscurity if its only outlet were mimeographed pamphlets.[60]

In "Symbolic Conduct," a Columbia Law Review article, criteria are suggested which might be used to define "speech." The criteria include: (1) The actor intends to communicate. Precedents lie in defamation and libel cases (must intend to defame to be convicted) and in types of non-verbal evidence accepted in court. Evidence of having met the intention criteria is described:

> ...look at the relationship between the conduct and the actor's normal routine. It then becomes possible to determine whether the conduct was an integral part of the individual's activity patterns in the circumstances and thus was non-assertive, or on the other hand a marked assertive departure from the individual's normal activity pattern and therefore assertive.[61]

draft-card burning and flag-burning would be allowed, if intended to communicate. (2) The conduct must have communicative value, must be capable of being understood by an audience. A substantial audience must be able to recognize the conduct as communication. Agreement by one or two good friends is not enough.[62] (3) The symbolism or medium may be an idea in itself. The medium may be a message: communicative value is not dependent upon verbalization.[63]

What Limits Are Placed on "Speech"? "...once it has been established that a particular act is protected by the First Amendment as symbolic conduct, the process of deciding what regulation of the symbolic conduct is proper can be carried out by application of the traditional First Amendment tests."[64] Application of First Amendment tests should yield "speech" which is allows for gaining access to the media.

The need for distinguishing between speech protected by the Constitution and speech limited by the Constitution has been emphasized by several authors.[65] The interests of the individual as speaker sometimes clash with societal interests. The need for limitations on individual speakers has been recognized by many.[66]

First Amendment freedoms have not been seen as absolute. They are, however, given preference over other laws. The doctrine of preferred position assumes that laws made limiting freedom of speech are invalid unless the maker of the law can show that in no circumstances does the law conflict with First Amendment Rights.[67] This is the reverse of most laws, presumed valid by the courts, with the weight of proof of unconstitutionality with those who would have the law removed.[68] But almost everyone will agree that some limits must be placed on free speech for the good of society.

Various tests have been established by the Court in an attempt to define what speech shall be protected and what speech shall be limited.

1. Clear and Present Danger Test suggested by Holmes in a 1919 case of a defendant accused of distributing anti-draft leaflets. Holmes suggested that in ordinary times the defendant would be within his rights: circumstances dictate allowance of rights.

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger, that they will bring about the substantive evils that Congress has a right to prevent. It is a question of time and degree.[69]

Specific circumstances, times, places constituting clear and present danger are not delineated. The test was employed extensively until the 1950's.

2. Bad Tendency Test: established in 1920 when socialist anti-war pamphlets were seen as having "a tendency to cause insubordination, disloyalty, and refusal of duty."[70] This test offers no protection to any opposition to governmental policies; it would protect little, if any, symbolic conduct. The bad tendency test has been abandoned.

3. Fighting Words Test: originated in response to a conviction of a violation of a New Hampshire law reading:

> No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in the street or other public place, not call him by any offensive or derisive name ....[71]

The Court responded that "offensive" shall be defined by "what men of common intelligence would understand would be words likely to cause an average addressee to fight."[72] Social value of the words, and audience's emotional response constitute the criteria of the fighting words test. It is invoked only for convenience sake.[73]

4. Balance Test: attempts to balance the interests of the individual against the interests of society, with an attempt to avoid protection of either interest to the detriment of the other. The test rosé out of a case involving the use of sound trucks on city streets without a permit. Prohibition of sound trucks, without permits, was reversed by the Court. The Court implied that each community could regulate, draw limits, by narrowly drawn ordinances. The Court concludes: "Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here. But in that process they should be mindful to keep the freedoms of the First Amendment in a preferred position."[74] Criteria are alluded to here, but are not concretely defined.

5. Other Available Means of Communication Test: product of the Nixon Court. The possibility of available means test is alluded to in the flag-burning case described earlier. The Court averted the flag-burning issue, with a decision made on the basis of words the defendant spoke, rather than his actions. But the Court suggested that such conduct might be protected when other channels of communication are not open.[75] The test was suggested a second time in the 1972 Lloyd v. Tanner case (previously discussed). The test asks: what are the alternative available means of communication? If none exist, then speech acts may be acceptable. The test has not been concretely stated yet. A problem of this test may be that it first asks available means, then defines what speech is allowed on that basis.

Other tests suggested by scholars include limitation on anarchy, maintaining choice v. coercion, gravity of evil test,[76] and defamation and libel tests.

The need for narrowly drawn and concrete limitations on free speech is advocated by many. Several attempts at defining limitations on speech have been made. These tests are important to speakers concerned with gaining access to media. For once speech has been broadly defined, to include symbolic conduct, the question of what speech is available for obtaining media access, is answered by the limiting tests. Access to media may be gained using any speech not generally limited by the Court. Speaker and listener rights must be related by specific, systematic criteria. One vantage remains: what constitutional rights protect the mass media? How do speaker and listener protections square with broadcasters' and publishers' rights to control their media?

MEDIA PERSPECTIVE

Broadcasters have contended for some time with the Fairness Doctrine dictum to afford controversial issues fair and balanced treatment.[77] Broadcasters are aware that if they treat one side of an issue, they must give the other side a hearing too. Licensees have greater discretion over commercial and editorial advertisements seeking air time. The United States Court of Appeals for the District of Columbia upheld an FCC ruling that radio and television managers who denied equal time to groups opposing the Armed Forces recruiting spot announcements did not violate the Fairness Doctrine.[78] Recently, the Supreme Court ruled in Columbia Broadcasting System, Inc. v. Democratic National Committee that neither the Communications Act nor the First Amendment requires broadcasters to accept paid political advertisements.[79] Writing for the majority, Chief Justice Burger argued that the undesirable effects of the right of access would outweigh the asserted benefits, resulting in a monopolization of the air-waves by the rich and a corresponding loss of the broadcaster's discretionary control over the treatment of public issues.

Since the press lacks the constraints of the Fairness Doctrine, access proponents have concentrated their attack on newspaper publishers' power to deny access.[80] Publishers have used previous court decisions to bolster their defense. The courts have generally accepted publishers' arguments that commercial speech is not entitled to First Amendment protection. Rulings in Valentine v. Christenson, Bread v. Alexandra, Barrick Realty v. City of Gary, Pittsburgh Press Co. v. Human Relations Comm., and Harry J. Lehman v. City of Shaker Heights have distinguished between commercial and noncommercial speech.[81] Countering arguments that the press has a public trust, like broadcasters, publishers have insisted that advertisement/newspaper agreements are not public in nature, but private contracts.

Courts have also accepted this view. In Shuck v. Carroll Daily Herald, the plaintiff submitted an advertisement to the only newspaper in the community, but was denied access by the newspaper, and later, by court decision.[82] The access seeker had no "title" to force agreement without the newspaper's consent. An earlier court decision in Mack v. Costello provided the underpinning for the newspaper's refusal.

> The publication of a newspaper is strictly a private business. It may be begun or discontinued at the will of the publisher. The publisher in publishing a newspaper, assumes no "office, trust, or station" in the public sense, or enters into any public or contractual relation with the community at large.[83]

And again in Mid-West Electric Cooperative Inc. v. West Texas Chamber of Commerce:

> The publishers of newspapers or magazines are generally under no obligation to accept advertising from any and all who may apply for its publication, but are free to deal or decline to contract with whom they please.[84]

It appears that in offering space for advertising, publishers make no public commitment to accept all comers. The access proponents' fight to open advertising space on a non-discriminatory basis has an uphill battle ahead.

Apparently, similar logic will be applied to publishers' denial of space to the letters-to-the-editor section of the newspaper. Decisions in Wall v. World Publishing Co. and Lord v. Winchester Star, Inc. upheld the newspapers' decision power over what letters will and will not be printed.[85]

The Supreme Court recently dealt a hard blow to the hopes of access proponents. In The Miami Herald Publishing Company, A Division of Knight Newspapers, Inc., Appellant v. Pat L. Tornillo, Jr., action was brought against a newspaper for refusing to grant space for a reply to an editorial attacking a local public official.[86] Writing for a unanimous Court, Chief Justice Burger pinpointed the issue.

> The issue in this case is whether a state statute granting a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper, violates the guarantees of a free press.[87]

A right to reply to newspaper editorials attacking persons has been a continual demand by those promoting the cause for media access. This demand, along with a sixty-one year old Florida law, was struck.

Justice Burger's opinion soundly supports the discretionary power of newspaper publishers:

> A government could not require "a newspaper to print that which it would not otherwise print" and that compelling the inclusion of some news was the constitutional equivalent of censorship.
>
> A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution, and, like many other virtues, it cannot be legislated. The law "exacts a penalty" from newspapers by requiring expenditures to print the reply and "taking up space that could be devoted to other material the newspaper may have preferred to print ...". It is not correct to say that a newspaper, as an economic reality, can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available."
>
> Such laws are unconstitutional, because of their "intrusion into the function of editors, the choice of material to go into a newspaper and the decisions made as to the limitations on the size of the paper and content and treatment of public issues and officials, whether fair or unfair."[88]

The Miami v. Tornillo decision would appear to put a damper on the access seeker's right to reply in the press.

Extending its argument that the press is a private endeavor, publishers have compared themselves to private property owners. Again, a recent Supreme Court decision appears to give impetus to this view, although it counters prior decisions. Early criteria for public/private distinctions was presented in Hague v. CIO:

> Where ever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from Ancient times, been a part of the privileges, immunities, rights and liberties of citizens.[89]

Later, the Supreme Court ruled that Marsh, a town completely owned by Gulf Shipbuilding Corporation, had all the characteristics of an ordinary town and thus First Amendment rights could not be denied because of private ownership.[90] Other outlets were lacking since all parks, residences, and streets were company owned. The Supreme Court extended the Marsh rationale to include peaceful

picketing of a large shopping center store which was employing a wholly non-union staff and was picketed by union members carrying pro-union signs (in Amalgamated Food Employees Union v. Logan Valley Plaza).[91] But in 1972, the Court apparently reversed this line of thinking. In Lloyd Corp., Ltd. v. Tanner, the Supreme Court supported security guard action to remove five young people distributing handbills in a large shopping mall which invited persons to a meeting of the "resistance committee" to protest the Vietnam war.[92] The opinion distinguished this case from the Logan Valley situation because the handbilling was unrelated to the shopping center's operations. The respondents could have distributed these handbills on any public street, on any public sidewalk, or in any public building in the city. Lange noted the Court's remark that "there is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests ... being served."[93] By analogy, private newspapers extend no "open-ended invitation" to publish material which is "incompatible" with the editorial interests that they wish to serve.

The Supreme Court further denied speech rights by ruling that a nonemployee union organizer does not have a First Amendment right to solicit a retail store's employees in its parking lot.[94] They ruled that in this (as opposed to Marsh and Logan Valley) the parking lot lacked the necessary functional attributes of public property, hardly resembling the company town in Marsh. Shopping center owners, and by analogy, private newspaper owners have been granted rights that were restricted earlier. The Lloyd decision by the presently constituted Supreme Court represents a fundamental reversal of that trend. In addition, the decision is clearly a reversal of earlier opinions. The present court is composed of four justices appointed by Former President Nixon, giving it a possible new look regarding First Amendment free speech decisions.

Access resistors' arguments are fortified by recent court decisions, prompting Lange to conclude that "there is, in short, little direct support for the access doctrine in either the history of the framing of the First Amendment or in the history of the American press."[95]

Whatever the eventual direction of future decisions, neither access proponents nor access resistors will give up their claims, their vantage of what best furthers American democratic procedures. Both will continue to advocate in large part Justice Douglas' eloquent dissent in Dennis v. United States:

> When ideas complete in the market for acceptance, full and free discussion exposes the false and they gain few adherents. Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions.

> Full and free discussion keep a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. Full and free discussion has indeed been the first article of our faith.[96]

FOOTNOTES

[1]An early version of this paper was presented at the Speech Communication Association of Pennsylvania convention, Pittsburg, October, 1974.

[2]Justice Brennan's often cited quote, New York Times Co. v. Sullivan, 376 U.S. 254, 170 (1964).

[3]Business Executives' Move for Vietnam Peace v. F.C.C. 450 F.2d 642 (D.C. Cir. 1971).

[4]Chicago Joint Bd. v. Chicago Tribune Co. 435 F.2d 470 (7th Cir. 1970).

[5]See generally Botein, "Access to Cable Television," Cornell Law Review, 419 (1972).

[6]Jerome A. Barron, "Access to the Press: A First Amendment Right," 80 Harvard Law Review, (June 1967), p. 1648; also see Douglas F. Duchek, comment, "Constitutional Law: The Right of Access to the Press," 50 Nebraska Law Review, 120 (1970); Robert L. Beals, Note, "Freedom of Expression in the Media: The Public's Claim for a Right of Access," 33 Ohio State Law Journal, 151 (1972).

[7]Samuel L. Becker, "Mass Communication and the First Amendment: An American Dilemma," Keynote address, ECA, April 1974, p. 10.

[8]Jerome A. Barron, Freedom of the Press for Whom? The Right of Access to the Mass Media (Bloomington, Indiana: Indiana University Press, 1973), p. 336.

[9]Barron, "Access to the Press," p. 1644.

[10]Barron, Freedom of the Press for Whom?, p. 12.

[11]D. Michael Stroud, "Newspaper Regulation and the Public Interest: The Unmasking of a Myth," 32 University of Pittsburgh Law Review, (1971), p. 605.

[12]Ibid., p. 1653.

[13]Ibid., p. 1653.

[14]M.O. Key, Public Opinion and American Democracy, (1961), 378-387.

[15]David L. Lange, "The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment," North Carolina Law Review, 52 (November, 1973), p. 7.

[16]Lange, p. 3.

[17]Robert O'Neil, Free Speech: Responsible Communication Under Law, (New York: Bobbs-Merrill, 1966), p. 67

[18]Mayflower Broadcasting Co. v. F.C.C. 340 (1941).

[19]O'Neil, p. 75.

[20]Barron, "Access to the Press," p. 1666.

[21]Barron, Freedom of the Press, p. 327.

[22]Ibid., p. 55.

[23]Barron, "Access to the Press," p. 1678.

[24]Stroud, pp. 601-603.

[25]Lange, pp. 10-14.

[26]Stroud, p. 603.

[27]Ibid., p. 39, 83.

[28]Ibid., p. 85.

[29]Stroud, pp. 605-606.

[30]Lange, pp. 10-14.

[31]Chester J. Antieau, Modern Constitutional Law: The Individual and the Government, v. 1 (Rochester, New York: The Lawyers Co-operative Publishing Co., 1969), p. 4.

[32]H.E. Knepprath, "Free, Freer, Freest Speech," Today's Speech, 16(4) Nov. 1968, p. 41.

[38]Thomas R. Nilsen, "Persuasion and Human Rights," WSJ 24 Autumn 1960, p. 204.

[34]Barron, "Access to the Press," p. 1678.

[35]In re Kay, 83 Cal. Rptr., 692; 148 (1970).

[36]Cox v. Louisiana 379 U.S. 536 (1965), 578.

[37]AP Wire Service, May 3, 1974, Phoenix, Arizona.

[38]Robert Redfield, "The Difficulty Duty of Speech," QJS 39 Feb. 1953, p. 8; also see The Right Not to Listen, Virginia Commission on Constitutional Government, Richmond, 1964.

[39]Special attention is paid to the issues of privacy in Louis D Brandeis and Samuel D. Warren, "The Right of Privacy," Harvard Law Review, v. 4(5) 1890, pp. 192-220; William Zelermeyer, Invasion of Privacy, (Syracuse: Syracuse University Press, 1956); and Don R. Pember, Privacy and the Press, (Seattle: University of Washington Press, 1972).

[40]Ruth McGaffey, "Book Reviews," Today's Speech 22(1) Winter 1974.

[41]George P. Rice, "The Right to Be Silent," QJS 57 Dec. 1961, p. 350.

[42]Chaffee, Free Speech in the United States, cited in Franklyn Haiman, "The Rhetoric of the Streets: Some Legal and Ethical Considerations," QJS 52(2) Apr. 1967, pp. 99-114.

[43]Alfred Kamin, "Residential Picketing and the First Amendment," Northwestern University Law Review, 61, May-June 1966, p. 182.

[44]Haiman, "The Rhetoric of the Streets," p. 101.

[45]Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[46]Peter J. Kane, "Freedom of Expression in Shopping Centers," Today's Speech, 22(3) Summer 1974, p. 48.

[47]Thomas W. Benson and Bonnie Johnson, "The Rhetoric of Resistance: Confrontation with the Warmakers," Today's Speech, 16(3) Sept. 1968, p. 40.

[48]Theodore Otto Windt, Jr., "The Diatribe: Last Resort for Protest," QJS 58(1) Feb. 1972, pp. 1, 8.

[49]Also see examples in Robert L. Scott and Donald K. Smith, "The Rhetoric of Confrontation," QJS 55(1) Feb. 1969, p. 7; James Andrews, "Confrontation at Columbia: A Case Study in Coercive Rhetoric," QJS 55(1) Feb. 1969, p. 9.

[50]Haiman, Franklyn S., "The Rhetoric of the Streets," p. 113.

[51]Bosmajian, Haig A., "Speech and the First Amendment," Today's Speech, 18(4) Fall 1970, pp. 3-11.

[52]Cox v. Louisiana (1965) 379 U.S. 559 13 L Ed 2d 487, 85 S Ct 453; Evan A. Davis, ed., "Symbolic Conduct," Columbia Law Review, 68(6), pp. 1094-1095, Stromberg v. California 283 U.S. 351 (1931); United States v. O'Brien 88 S Ct 1673 (1968).

[53]Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[54]Burnside v. Byers, 367 F.2d 744 (1966).

[55]Schacht v. The United States, 398 U.S. 58 cited in Paul C. Bartholomew, Significant Decisions of the Supreme Court: 1969-70 Term, American Enterprise Institute, 1970, Special Analysis #23, pp. 12-13.

[56]Hodes v. Neimowitz, 1967 Fed. Dist. Ct., cited in Peter Kane, "Freedom of Speech for Public School Students," Speech Teacher, 20(1) Jan. 1971, pp. 21-28.

[57]People v. Street, 20 N.Y., 2d 231 229 N.E. 2d 187, 282 NYS 2d 491 (1967).

[58]Davis, pp. 1103-1104.

[59]Called for previously by Charles M. Rossiter, Jr., and Ruth McGaffey, "Freedom of Speech and the 'New Left': A Response," CSSJ, 22(1) Spr. 1971, pp. 5-10.

[60]Davis, p. 1091.

[61]Ibid., p. 1112.

[62]Ibid., p. 1116.

[63]Ibid., p. 1117.

[64]Ibid., p. 1117.

[65]These include: Haig A. Bosmajian, "Speech and the First Amendment," Today's Speech 18(4) Fall 1970, pp. 9-10; Roger Baldwin, "Freedom of Speech: Issues and Cases," QJS 52(2) Apr. 1966, pp. 186-190; Rossiter and McGaffey; and Chester J. Antieau, Modern Constitutional Law, v. 1 (Rochester, N.Y.: The Lawyers Co-operative Publishing Co., 1969), p. 6.

[66]See also Meiklejohn, Political Freedom, p. 25; Claude L. Heathcock, The United States Constitution in Perspective, (Boston: Allyn and Bacon, 1968), p. 191; Baldwin, p. 186.

[67]Jethro Lieberman, Understanding Our Constitution, (New York: Walker and Co., 1967), p. 124.

[68]Justice Frankfurter disagrees with preferred position doctrine. in Kovac v. Cooper 336 U.S. 77 (1949).

[69]Schenk v. The United States, 249 U.S. 47, 52.

[70]Pierce v. The United States, 252 U.S. 239 (1920).

[71]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[72]Ibid., p. 568.

[73]Ibid., p. 568.

[74]Saia v. New York, 334 U.S. 558, 92 L Ed 1574, 68 S Ct 1148.

[75]Davis, pp. 1103-1104.

[76]Dennis et al. v. The United States, 341 U.S. 494.

[77]O'Neil, pp. 70-73.

[78]Green v. FCC, 39 U.S.L.W. 2741 (June 18, 1971).

[79]Columbia Broadcasting System, Inc. v. Democratic National Committee, 41 U.S.L.W. 1183 (May 29, 1973).

[80]Louis L. Jaffe, "The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access," 85 Harvard Law Review 768 (1972); Glen O. Robinson, "The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation," 62 Minnesota Law Review 67 (1967); Clifton Daniel, "Right of Access to Mass Media--Government Obligations to Enforce First Amendment?" 48(4) Texas Law Review, 783-790.

[81]For rebuttals to this attack, see Valentine v. Christenson, 316 U.S. 52 (1942); Breard v. Alexandra, 341 U.S. 662 (1951); Pittsburgh Press Co. v. Human Relations Commission, 41 U.S.L.W. 1198 (June 21, 1973); Harry J. Lehman v. City of Shaker Heights, U.S.L.W. 42 (50), pp. 5116-5123.

[82]Shuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933).

[83]Mack v. Costello, 32 S.D. 511, 143 N.W. 950 (1913).

[84]Mid-West Electric Company Inc. v. West Texas Chamber of Commerce, 369 S.W. 2d 842 (1963).

[85]Wall v. World Publishing Co., 263 P. 2d 1010 (Okla. 1953), Lord v. Winchester Star, Inc., 346 Mass. 764, 190 N.E. 2d 875 (1963).

[86]The Miami Herald Publishing Co., A Division of Knight Newspapers, Inc., 42 U.S.L.W., pp. 5098-5105 (June 25, 1974).

[87]Ibid., p. 5099.

[88]The New York Times, CXXIII, No. 42, 522 (June 26, 1974), pp. 1, 18.

[89]Hague v. CIO, U.S. 1234 (1939).

[90]Marsh v. Alabama, 326 U.S. 501 (1946).

[91]Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

[92]Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[93]Lange, p. 34.

[94]Central Hardware Co. v. NLRB, 40 U.S.L.W. 4826 (June 1972), 33 L. Ed. 2d 122.

[95]Lange, p. 14.

[96]Dennis v. United States, 341 U.S. 494, 584 (1951).

REPRESSION IN GREAT BRITAIN: 1792-1795

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Embodied within the Magna Carta are many tenets of British and American jurisprudence. Article 29 articulates the fundamental principles of justice and due process:

> No Freeman shall be taken, or imprisoned, or be disseised (i.e., deprived) of his Freehold, or Liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. (2) We will sell to no man, we will not deny or defer to any man either Justice or Right.[1]

Later developments in English law, such as the Petition of Right (1628)[2] and the Habeas Corpus Amendment Act (1679)[3] served to strengthen and refine the principles of Article 29. Even today, this article is "regarded as a guarantee of law, liberty, and good government, protecting every individual against arbitrary state interference and providing him with a procedure of appeal in the event of any infringement of his liberties, appeal to the judgment of his peers or the law of the land."[4]

During the period 1792-1795, the Pitt Government and its supporters in the British Parliament enacted numerous measures which seriously threatened and/or legally curtailed rights granted or implied under the Magna Carta. Among these were the Proclamation for the preventing of tumultuous Meetings and seditious Writings (May, 1792), the Proclamation for Calling Out the Militia (December, 1792), the Alien Act (January, 1793), the Traitorous Correspondence Act (March, 1793), the Habeas Corpus Suspension Act (May, 1794), the Treasonable Practices Act (December, 1794), and the Seditious Meetings Act (January, 1795). The purpose of this essay is to provide, using both primary and secondary sources, an historical account of the issues in conflict during this period, an analysis of the nature and strength of opposition to the government, and a judgment of the Government's justifications for the repressive measures.

A domestic problem of long standing was parliamentary reform.[5] Boundary lines for Common's legislative districts, called boroughs, had not been redrawn for years, despite shifts in population due to increased industrialization of cities. Further, each borough set its own voter qualification standards, and those standards tended to reflect the wills of small groups of politically powerful men

or families. In some boroughs, for instance, the franchise was extended to every working male, especially if most of those men were employed by one of the borough's representatives in the House of Commons. Other boroughs were unduly restrictive regarding voting rights and extended the franchise only to certain men who owned property of a given value. Exacerbating these two difficulties was the fact that a Commons member for a borough did not have to reside in the borough. Indeed, it was common practice for a candidate to "stand for," i.e., "run for election in," a borough because influential persons therein asked him to run and made it worth his while to do so. When those same influential persons controlled the franchise rights, elections became a matter of manipulation rather than free choice. These abuses led to the formation of groups which agitated for parliamentary reform. The earliest of these was the Society of the Supporters of the Bill of Rights, founded in 1769, in which John Horne (later known as John Horne Tooke) was active.[6] During the 1770's, there appeared several active writers of pamphlets in support of parliamentary reform: Granville Sharp, The Legal Means of Political Reformation (1773-1774) and A Declaration of the People's natural right to share in the Legislature (1774); Major John Cartwright, Take your Choice! (1776) and The People's Barrier against Undue Influence and Corruption (1780); and John Jebb, An Address to the Freeholders of Middlesex (1779) and Report of the Subcommittee of Westminster on the State of the Representation (1780).

These seemed to have some effect upon Commons, as did the Society for Constitutional Information, formed in 1780. Pitt the Younger was elected to Commons in 1781 and soon became a strong advocate for parliamentary reform. Petitions for reform came from dozens of boroughs in 1782-1783. In 1785, Pitt, who was Prime Minister, proposed a reform bill in the House of Commons.[7] It was defeated and pressure for reform seemed to be blunted for the next few years.

The cause of parlimentary reform was revived by the French Revolution in 1789. Several new societies were founded--the London Revolution Society (1789), the London Corresponding Society (1792), the Society of the Friends of the People (1792), and the Friends of the Liberty of the Press (1792)--and the Society for Constitutional Information (also known as the London Constitutional Society) became increasingly active. Publication of Edmund Burke's Reflections on the Revolution in France in November of 1790 further stirred the reformers, for Burke's advocacy of gradual reform was too moderate and his stand against "natural rights" was infuriating. A few months later, Paine's Rights of Man and Mackintosh's Vindiciae Gallicae rebutted Burke's position. In July, 1791, a celebration of the second anniversary of Bastille Day in Birmingham developed into a riot during which Dr. Joseph Priestley's home was virtually destroyed.[8] There were reports of disturbances at Norwich also, but elsewhere in England the event was marked without violent incident.

Thus, the long-standing cause of parliamentary reform was vivified by the French Revolution. Political organizations began to spring up among the workingmen, as chapters of the societies mentioned above were established in more cities. The nature and strength of these opposition forces from 1792-1795 will be described below.

The Opposition to the Pitt Government's stand against parliamentary reform was not numerically strong, either in Parliament or across the land, but it was often effectively organized and vociferous.[9] The two foremost Opposition figures in Parliament were Thomas Erskine, who was affiliated with the Friends of the Liberty of the Press, and Charles James Fox, who joined none of the organized societies. The Society of the Friends of the People had several members from Parliament--Philip Francis, Charles Grey, William Lambton, Richard Brinsley Sheridan, and Samuel Whitbread. The London Corresponding Society was primarily a workingman's association (its dues were a penny per week) founded by John Horne Tooke, a longtime activist for reform, and Thomas Hardy, who served as Secretary during the group's most active years. Hardy's arrest in May, 1794 led to the Habeas Corpus Suspension Act.

All of the societies held meetings and distributed pamphlets. Meetings were well-advertised by the pro-Opposition press and handbills were often distributed before meetings in the small cities and outlying towns. The usual meeting consisted of dinner followed by a business meeting and speeches by noteworthy members or guests. Sheridan and Erskine spoke at a meeting of the Friends of the Liberty of the Press on January 19, 1793.[10] Meetings were widely reported in the pro-Opposition newspapers, with glowing accounts of the size of the crowd, the toasts drunk, the resolutions passed, and the excellence of the addresses.[11] While the meetings served to coalesce the membership, the distribution of pamphlets made the various societies' purposes known far and wide. Few pamphlets were bland political treatises; most were hyperbolic in tone as they castigated Prime Minister Pitt, his supporters, and the political doctrines for which they stood. Pamphlets such as Joseph Gerrald's The Only Means of Saving Us from Ruin (1793) and George Tierney's The State of the Representation of England and Wales (1793) received wide circulation, and a speech by Erskine was printed in an edition of 100,000.[12]

However strident the societies' voices may have been, they were not, by any estimate, numerically large. The handful of sympathetic members of Parliament seldom mustered more than three score votes; on the Habeas Corpus Suspension Bill, for instance, the Opposition's best showing was 39 votes of 240 cast in Commons.[13] The largest group was the London Corresponding Society, but its actual membership was "a few thousand" despite its claims of

"scores of thousands" of members.[14] The other societies were smaller yet and often loosely organized. Petitions from various cities were presented from time to time in Commons, but these seldom carried more than a few thousand signatures.[15] In the winter and spring of 1793 many petitions were rejected by Commons, either on technical grounds or because of "evident disrespect." If the societies had difficulty communicating with Parliament, they had even more difficulty communicating with each other. The Society of the Friends of the People resolved to refrain from correspondence with the Society for Constitutional Information because of ideological differences.[16] Attempts to bring all of the reform groups together for a grand British Convention in October, 1793, ended in grand disorganization. A hastily scheduled second British Convention in November drew members from 50 national and local groups, but it was broken up by the authorities and accomplished little beyond the passage of a few resolutions.[17]

Despite the apparent lack of real power in the reform societies, the Pitt government moved relentlessly to stifle them. From 1792-1795, no less than seven repressive measures--the Proclamation for the Preventing of tumultuous Meetings and seditious Writings (May, 1792), the Proclamation for Calling Out the Militia (December, 1792), the Alien Act (January, 1793), the Traitorous Correspondence Act (March, 1793), the Habeas Corpus Suspension Act (May, 1794), the Treasonable Practices Act (December, 1794), and the Seditious Meetings Act (January, 1795)--were approved by Parliament.[18]

The first Royal Proclamation was aimed at Opposition newspapers and pamphlets. It asserted that "divers(e) wicked and seditious writings have been printed, published, and industriously dispersed, tending to excite tumult and disorder, by endeavoring to raise groundless jealousies and discontents in the minds of our faithful and loving subjects ...."[19] The Proclamation called upon all citizens to "guard against all such attempts which aim at the subversion of all regular government," and charged all law officers to "suppress and prevent all riots, tumults and other disorders" and to provide "full information of such persons as shall be found offending." Both this edict and the Proclamation for Calling Out the Militia alleged that the Government had "reason to believe" or "information" that the reform societies were in contact with "persons in foreign parts."[20] This charge was the foundation of the five repressive Acts to come later. When the Opposition attempted to show that correspondence between the British and the French reform societies was public record and constituted no threat, they were buried in a landslide of votes.

The Alien Act and the Traitorous Correspondence Act flowed quite naturally from these proclamations. Feeling was running strongly pro-Government as war with France seemed certain. The

Alien Act was designed to curtail travel between England and France. It established regulations on immigration from France and provided for detention areas for "French Assassins and Domestic Traitors."[21] Opposition to the bill was largely from Fox, but he was unable to adjourn the House and the bill passed by acclamation, without need for a division. Suspension of habeas corpus was contemplated by the Government[22] and feared by the reformers, but no Bill was forthcoming, though it would have passed easily. Instead, the Traitorous Correspondence Act was passed in March, 1793. It passed Commons by a single vote, 154-153, not because the Opposition had regrouped, but because it was an incredibly bad piece of legislation. Most thought it dealt with all letters passed between England and France, but it actually affected only commercial transactions.[23] Little enforcement of the Act was attempted and the measure seems to be a good example of repressive legislation with no real purpose.

The war with France was slightly more than a year old when the Pitt Government decided to suspend habeas corpus, a right guaranteed by the Magna Carta. Thomas Hardy, longtime secretary of the London Corresponding Society, was arrested on May 12, 1794, and many documents were confiscated. The Government alleged that the seized documents revealed "dangerous designs" and proposed to suspend habeas corpus, which would, in effect, declare martial law.[24] This repressive measure passed easily in the climate of manufactured fear which surrounded it and many reformers were arrested and detained under the new law. When Thomas Hardy and John Horne Tooke were tried for "high treason" later in 1794, both were acquitted.[25]

The Habeas Corpus Suspension Act stopped much reform activity during 1794-1795, but worsening economic conditions gave reformers another issue to press. "Bread riots" in some cities and the blockading of the King's coach were answered by the passage of the "Two Acts," as they were known, the Treasonable Practices Act and the Seditious Meetings Act.[26] These were perhaps the most arbitrary of the repressive measures. The Treasonable Practices Act made any spoken or written words against the Government ipso facto "treason." No proof of tumult or violence resulting from the words was required. The Seditious Meetings Act empowered magistrates to grant permits for public meetings and to break up unlicensed meetings deemed to be "seditious." Although Fox led a strong campaign against these bills, they passed relatively easily.[27]

During the time these overtly repressive measures were being passed, the Pitt Government also moved against reformers in more subtle, but no less inhibiting ways. A pro-Government loyalty association, the Association for Protecting Liberty and Property against Republicans and Levellers, was formed by John Reeves in

November, 1792. Reeves was a Government figure of note, having been a judge in Newfoundland.[28] Apparently, he continued to be paid from His Majesty's Treasury while leading The Association, as it was known. Loyalty addresses were solicited and they poured forth. Meetings of The Association often ended in "Paine burnings," and there is evidence to indicate that some "tumult" was caused by Loyalists but attributed to reformers.[29] Spies and informers also served the Government. Home Secretary Henry Dundas managed a network of spies in Scottish reform societies, and James Boswell may have been a spy at the ill-fated British Convention.[30]

The Government moved relentlessly against the Opposition press. Newspapers were harassed and forced to pay arbitrary taxes not levied upon the pro-Government publications.[31] At least one newspaper, the Argus, was forced into bankruptcy. The "premises, the press, the type and many of the materials" were sold to the Treasury and underwent a metamorphosis, being used later to print the True Briton, a pro-Government newspaper![32] Many publishers of pamphlets and booksellers were likewise set upon by marshals and detained or charged with selling incendiary material. All the while, of course, the Pitt Government created a pamphlet campaign of its own. John Bowles wrote many pro-Government treatises, and there were other such writers, most of whom held Government posts or benefited from sinecures.[33]

The most pervasive Government campaign involved the arrest and trial of reform society members for "seditious libel" or some similar charge. Many members were thus detained, and newspaper writers and publishers were likewise prosecuted. Convictions were trumpeted in the pro-Government press,[34] but sentences were often delayed or not carried out at all. The Government had little success in prosecuting major figures. Tom Paine was tried in absentia, and the trials of Thomas Hardy and John Horne Tooke ended in failure for the Government. The Pitt Government gained maximum publicity from the arrests and trials, but the verdicts tended to vindicate the reformers. There were exceptions, of course. Judge Braxfield regularly sentenced reformers to "transportation" (exile to a British colony or protectorate). Perhaps his comment at the trial of Thomas Muir epitomizes the Government's attitude toward reform. "The British Constitution is the best that ever was since the creation of the world and it is not possible to make it better."[35] Given the lack of numerical strength and cohesive organization in the reform societies, the Government campaign of repression seems both extreme and unjustified. The courts vindicated most of the reformers prosecuted for "high treason," though many lesser charges were sustained. One major question remains: Why was the repression tolerated for so long by Parliament and by the populace?

Actually, the repressive legislation affected very few directly, except, of course, the officers and more active members of reform societies. The Traitorous Correspondence Act, for example, was rarely invoked against anyone. Further, the reform groups were unable to agree among themselves and, therefore, unable to muster any concerted effort to arouse other segments of the population. The pamphlets and broadsides were distributed mainly among the zealous reformers themselves. Indeed, the reform societies were little more than social clubs in some instances and resembled debating societies in others. Their insufficient numbers and lack of communication with the population at large limited their influence significantly.

Parliament, on the contrary, was firmly in control of a highly organized force, the Pitt Government. Although confidence in the Government had wavered during the Regency Crisis (1788-89), both Houses fell in step with policies outlined by Prime Minister Pitt from 1790-1795. When the war with France erupted, most Members sided with Pitt's plans for a full-scale European offensive. It is not surprising, then, that these same members would back repressive legislation at home, for their seats of power depended upon perpetuation of the status quo. Acknowledgement of the reforms would have meant redrawn districts and scores of new electors voting in the next election. Given this uncertain state, the Members endorsed Pitt's repressive legislation time after time even though the circumstances probably did not warrant it. Without doubt, the repressive legislation was both ill-conceived and unjustified. Perhaps a fear of change in the status quo fed upon itself until a near-hysteria of over-reaction took hold in Parliament. Even the mildest reforms, enacted in the mid-1780's, would have served to conciliate many of the reformers who agitated later. As it turned out, the Government actually sustained itself for nearly ten years by continuing repressive activities and failing to consider any reform measures. Perhaps the Morning Chronicle's verse puts it best:

NATIONAL ALARM

There can be no harm in giving alarm,
And scaring the People with strange apprehensions;
By brewing this storm, we avoid a Reform,
And securely enjoy all our places and pensions.[36]

FOOTNOTES

[1]Anne Pallister, Magna Carta: The Heritage of Liberty (Oxford: Clarendon Press, 1971), appendix, p. 117.

[2]Maurice W. Thomas, The English Heritage (London: Thomas Nelson and Sons, 1944), p. 158.

[3]George Burton Adams, Constitutional History of England (New York: Henry Holt and Co., 1921), p. 347.

[4]Pallister, p. 103.

[5]The best study of the reform campaign is G.S. Veitch, The Genesis of Parliamentary Reform (first printed 1913, London: Constable, 1965); see also Donald Grove Barnes, George III and William Pitt, 1783-1806 (Stanford: Stanford University Press, 1939), Philip Anthony Brown, The French Revolution in English History (first printed, 1918 New York: Barnes and Noble, 1965), Caroline Robbins, The Eighteenth-Century Commonwealthman (Cambridge: Harvard University Press, 1959), and J. Steven Watson, The Reign of George III, 1760-1815 (Oxford: Clarendon Press, 1960).

[6]Veitch, p. 29 Eugene Charleton Black, The Association: British Extraparliamentary Political Organization 1769-1793, Harvard Historical Monographs, LIV (Cambridge: Harvard University Press, 1963), pp. 10-22. For primary source material, see Alexander Stephens, Memoirs of John Horne Tooke (2 vols., first published, 1813; New York: Burt Franklin, 1968).

[7]After defeat of his Bill, Pitt found it more prudent politically to oppose parliamentary reform; see Barnes, pp. 123-131, 302 and Black, pp. 128-129.

[8]John Alfred Langford, A Century of Birmingham Life (2 vols.; Birmingham: W.G. More, 1870), I, 476-486.

[9]All of the studies cited in notes 5 and 6 reach this conclusion; also useful is a study of the reform societies based upon the newspapers of the day, Lucyle Werkmeister, A Newspaper History of England, 1792-1793 (Lincoln: University of Nebraska Press, 1967), esp. pp. 193-194.

[10]Werkmeister, p. 200.

[11]Ibid., passim.

[12]Star, January 24, 1793.

[13]The Parliamentary History of England ... to ... 1803, ed William Cobbett, XXXI (March 14, 1794-May 22, 1795), 521 Hereafter cited as Parliamentary History

[14]Werkmeister, p. 194. Black, pp. 226-227; and Barnes, pp. 214-215.

[15]Brown, pp. 101-102. Veitch, pp. 280-281.

[16]Werkmeister, pp. 78, 84.

[17]Veitch, pp. 283-288, Werkmeister, pp. 446-448.

[18]Besides Cobbett's Parliamentary History, accounts of all of these may be found in the Annual Register, vols. XXXIV-XXXVII.

[19]Annual Register, XXXIV (1792), 158.

[20]Ibid., pp. 159-160, 166.

[21]Public Advertiser, January 3, 1793.

[22]Pitt to Dundas, November 28, 1792. This letter is in the Clements Library, University of Michigan, Ann Arbor.

[23]Werkmeister, pp. 248-266, summarizes the Bill and pro and con newspaper reaction.

[24]For a study of the Habeas Corpus Suspension Act and Pitt's role in passing it, see my "William Pitt and Suspension of Habeas Corpus," Quarterly Journal of Speech, LX (December, 1974), pp. 468-476.

[25]Barnes, p. 304.

[26]Ibid., p. 309.

[27]Loren Reid, Charles James Fox: A Man for the People (Columbia: University of Missouri Press, 1969), pp. 317-321.

[28]Black, pp. 233-275; Veitch, pp. 230-233; a useful primary source is Daniel Stuart, Peace and Reform, against War and Corruption (London: n.p., 1794).

[29]Black, pp. 256-259; Werkmeister, pp. 151-152.

[30]Dundas to Pitt, November 12, 1792 (Clements Library); Werkmeister, pp. 170-228.

[31]Werkmeister, pp. 30-41, 163-169, and passim.

[32]Ibid., p. 143.

[33]Ibid., pp. 169-179. Bowles wrote A Protest against T. Paine's "Rights of Man" (1792) and The Real Grounds of the Present War with France (1793). Other writers were: Joseph Cawthorne, A Letter to the King (1796); William Combe, A Letter from a Country Gentleman (1789); and William Augustus Miles, A Letter to Earl Stanhope (1794).

[34]Werkmeister, pp. 230-236, 341-349.

[35]Brown, p. 98; Werkmeister (p. 406) and Veitch (pp. 258, 262) have similar accounts.

[36]Werkmeister, p. 142.

THE SUPREME COURT AND THE FIRST AMENDMENT: 1974-1975

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I. The Decline of Predictability

In 1968 President Nixon promised the people that he would give the country a rightward leaning "strict constructionist" high court. Through four appointments--Warren Burger (1969), Harry Blackmun (1970), Lewis Powell (1971), and William Rehnquist (1971)--he hoped bloc voting would contain the previous decisions of the "runaway" Warren liberals. For several years the Court has acted generally as conservatives had hoped and as liberals had feared. The Nixon four needed only one of the swing justices (White or Stewart) to be assured of a five-vote majority, and this frequently happended. Moderation and restraint was assured. But the Supreme Court has a strange and almost predictable affect on some justices who mature while on the job, shake off the felt obligations inherited with their appointment, and assert an independence which in the transition stage makes them predictably unpredictable. Justices Blackmun and Powell appear to be in transition based on signs of emancipation from the bloc.

Despite a decline in the voting solidarity of Nixon's appointtees, their power to control decisions remains strong. Although less united than during the first two years, their generally conservative position continues to attract two of the more moderate justices of the Court. During the 1974-1975 term the Nixon appointees voted together on 69 per cent (compared to 75 per cent in 1973-1974) of the 137 decisions handed down. Only eight times did these four fail to command a majority when three or more of them voted together. Generally they received strong backing from swing justices White and Stewart who gave even greater support to the bloc this term than before.

Criminal law cases constituted one quarter of the 1974-75 docket. The Burger bloc voted together on 88 per cent of these and provided the nucleus of a majority for each case. The Nixon appointees were together on 86 per cent of the cases involving court jurisdiction, 80 per cent on education, 71 per cent on discrimination, 65 per cent on business, 63 per cent on taxes, and 50 per cent on First Amendment rights.

Although predictability about behavior of both liberal and conservative justices has been highly accurate in the past, there are growing signs of unpredictability. The Nixon-appointed Burger bloc is cracking while solidarity in the Court's liberal bloc is also slipping.

The number of cases on which one of four Nixon justices deserted the others rose from 23 last term to 27 this term. Rehnquist differed from the bloc 10 times, Blackmun 8, Powell 7, and Burger 2. On four of the eight First Amendment cases Rehnquist, who dissented each time and was joined twice by Burger, split from the other Nixon appointees.

The widest crack in the bloc with the most implications seems to be Justice Blackmun's growing independence. Blackmun's emergence from Chief Justice Burger's shadow is evidenced by the frequency with which the two have disagreed, 10 per cent in Blackmun's first term compared to 20 per cent in the most recent term. Burger and Blackmun recently split on two First Amendment cases, and there is speculation that Burger may have been following Blackmun when in Bigelow v. Virginia* he supported extending First Amendment protection to newspaper advertisements.

Nixon's confidence that he had found reliable men who collectively would move the Court away from Warren-led liberals to "restoration of law and order" may be in jeopardy. Powell has demonstrated how he can stray from the bloc, Blackmun's independence is growing, and Rehnquist's potential as a loner has never been in question. Burger and Rehnquist remain as the most certain conservative votes. Powell, Stewart, White, and Blackmun can now be described as the "searching middle," and this is what compounds the Court's unpredictability.

To further complicate predictions about the fate of all cases before the Court and those pertaining to the First Amendment in particular, solidarity in the liberal bloc--Douglas, Brennan, and Marshall--is on the decline. While they voted together 75 per cent of the time during the 1973-74 term, this fell off for all cases to 57 per cent during the recent term. Half of the First Amendment cases were decided with one of the so-called liberals opposing the other two. Indeed, consider the curiosity of the 5-4 Court alignment when Justice Blackmun supported by Brennan, Marshall, and Powell held that procedural safeguards guaranteed by the First Amendment were violated when the rock musical "Hair" was denied use of a public theatre. (Southeastern Promotions v. Conrad). Justices Douglas, Burger, and Rehnquist all dissented while swing justices White and Stewart held views opposing each other.

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*Case citations for the 1974-75 Supreme Court term do not appear in this article because they are not assigned until a time subsequent to the preparation of this material.

As the justices vote their individual convictions and the searching middle (White, Stewart, Powell, and Blackmun) rethinks difficult questions, intended alignments become muddled and the naivete of presidents who think they can shape the Court in their own image becomes clearer.

II. The 1974-75 Term in Review

The 1974-75 term was not a banner year for decision-making. Although the session was one of the longest regular sessions in history, legal observers regard it as one of the dullest. Justice Douglas, who has had more to say about the First Amendment and has said it with greater profoundness than any other member now on the Court, was absent during all but three weeks of the last six months of the term. The deterioration of his health undoubtedly has influenced his articulation of arguments on behalf of First Amendment absolutism, and the stroke he suffered may have all but silenced this most staunch advocate of unfettered speech. Nevertheless, the Court was active throughout the term, affecting the First Amendment by what it declined to take up along with eight cases singled out for certiorari, argument, and decision. For these eight cases the First Amendment is of primary and not the incidental concern which can be found in two additional cases not herein reviewed.

Four decisions pertained to freedom of the press, two limited that freedom, and two expanded it. In a New Jersey case the Court held that a radio station or newspaper can be regulated by a court or a commission and prevented from publishing certain "news-of-the-day" items. However, the advertising of New York abortion services in a Virginia newspaper resulted in a determination that speech is not stripped of First Amendment protection because it takes the form of paid commercial advertising. In an Ohio case the Court held that the journalist's attitude toward an individual's privacy and not the truth or falsity of the published material should control invasion of privacy determinations. However, the Court took a more liberal view when in Cox Broadcasting Corporation v. Cohn it held that the public interest in a free press prevails over interests of privacy when the information involved is already on the public record.

A Florida case involving a Jacksonville drive-in theatre further detracted from what Justice Brandeis called "the right to be let alone." Here any right in public to a kind of privacy--a protection against intrusion on those individual sensibilities which are vulnerable in a compact modern society--lost out to what the divided Court found to be more prevailing First Amendment considerations.

In two other cases the Court declined to extend First Amendment rights to litigants appealing for protection. In the Jacobs case the Court avoided rendering an opinion on the merits of a case which clannenged a school board regulation prohibiting distribution of literature likely to produce significant disruption to the educational process. Also, supremacy was granted to the subpoena right of Congress when in Eastland v. United States Servicemen's Fund the Court declined to allow claims of infringement on First Amendment rights to prevail over the congressional right to indulge in speech and debate predicated on subpoened information.

Since the June 1973 decisions on obscenity (see Free Speech Yearbook 1973, pp. 70-74), Justice Douglas has claimed that efforts to clarify the nature of obscenity when treated as unprotected speech have raised more questions than have been answered. The number of cases submitted to the Court this past term seems to verify Douglas' fears. Frequently raised questions pertain to the legality with which "obscene" materials are seized or banned, the applicability of nuisance laws to permit seizure of allegedly obscene materials and to prohibit allegedly obscene behavior, and the status of convictions determined or acts committed prior to the June 1973 new obscenity tests. Significantly, however, only one obscenity case, Southeastern Promotions v. Conrad, resulted in a formal Court opinion.

Justice Douglas, who has been unable to conclude that obscenity is not protected speech, asked in his dissent in Miller v. California, 413 U.S. 15 (1973), "how under such vague tests can convictions be sustained for the sale of an article prior to the time when some court has declared it to be obscene." Although Douglas dissented in the Southeastern Promotions case for other reasons, the five-justice majority held that city officials cannot constitutionally ban a theatrical performance containing nudity and simulated sex without first proving to a judge that the production is legally obscene. The Court declined, however, to take up another significant question raised by the appeal: Should stage plans be subject to harsher obscenity standards than movies and books because they include live depictions of conduct that itself might violate criminal laws if done in public?

III. Opinions Rendered

Newspapers

Cantrell v. Forest City Publishing Co. (43 LW 4079)

A mother and son brought action against a newspaper publisher and reporter for invasion of privacy resulting from the impact on the family of a newspaper story about the death of the father. The story contained inaccuracies and false statements about the family.

The trial court found for the plaintiffs after the judge instructed the jurors "that liability could be imposed only if they found that the false statements were published with knowledge of their falsity or in reckless disregard of the truth." The Court of Appeals reversed the trial court and held that the definition of malice used was in fact a determination that there was no evidence of the knowing falsity or reckless disregard of the truth required for liability.

In an 8 to 1 decision the Supreme Court reversed the appellate court by interpreting the trial judge's position to be that an invasion of privacy case should turn on the defendant's attitude toward the plaintiff's privacy and not on the truth or falsity of the published material. Regardless, the Supreme Court found sufficient evidence to support the jury's findings that knowing and reckless falsehoods were published.

In his dissent Justice Douglas called the majority opinion an abridgement of the First Amendment and a free press. Douglas contended that "the press will be 'free' in the First Amendment sense when the judge-made qualifications of the freedom are withdrawn and the substance of the First Amendment restored." Douglas objected to having the First Amendment freedom to report the news turn on subtle differences in the definition of "malice." He concluded, "It seems clear that in matters of public import such as the present news reporting, there must be freedom from damages lest the press be frightened into playing a more ignoble role than the Framers visualized."

Bigelow v. Commonwealth of Virginia (43 LW 4735)

The Virginia Weekly, a Charlottesville newspaper, published an advertisement for a New York organization announcing legal New York abortion services. Bigelow, the managing editor, was convicted under a Virginia statute which prohibited sale or circulation of any publication that encourages or prompts the processing of abortion. The Virginia Supreme Court affirmed the conviction, rejected Bigelow's First Amendment claims, and held that the advertisement was a commercial one which could be constitutionally prohibited under the State's police power. Since the purely commercial activity was a bar to First Amendment claims, Bigelow had no standing to challenge the overbreadth of the statute.

Justice Blackmun delivered the opinion for the seven-justice majority. Rehnquist and White dissented. The Court held that the Virginia statute as applied to Bigelow infringed constitutionally protected speech. Speech was not to be "stripped of First Amendment protection" because it takes the form of paid commercial advertising. The advertisement, Blackmun held, conveyed information

to a diverse audience whose constitutional interests coincided with Bigelow's First Amendment rights. Blackmun concluded, "a state does not acquire power or supervision over the internal affairs of another state merely because the welfare and health of its own citizens may be affected when they travel to the State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State."

Justices White and Rehnquist emphasized Virginia's interest in preventing commercial exploitation of the health needs of its citizens. They found the Virginia statute to be a "reasonable regulation that serves a legitimate public interest."

Radio and TV

Cox Broadcasting Corporation v. Cohn (43 LW 4343)

During a news broadcast a reporter broadcast a rape victim's name which had been obtained from public records made available for inspection. The victim's father brought action for invasion of privacy under a Georgia statute which made it a misdemeanor to broadcast a rape victim's name. The lower courts held the communication not privileged under the First Amendment since the Georgia statute declared a state policy that a rape victim's name was not a matter of public concern.

The Supreme Court with Justice Rehnquist dissenting reversed the Georgia courts and in an opinion delivered by Justice White held that if there are "privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information." The interests in privacy must be balanced against the interests of the public to know and the press to publish. The Court concluded that crime and the resulting judicial proceedings are events of legitimate public concern and consequently fall within the responsibility of the press to report the operation of government. The public interest in a free and vigorous press protected by the First Amendment prevails over interests of privacy when the information involved already appears on the public record.

U.S. v. New Jersey State Lottery Commission (43 LW 4313)

By federal law, 18 U.S.C., sect. 1304, the broadcast of lottery information is illegal. A New Jersey radio station before the F.C.C. argued that section 1304 should not apply to the broadcast of lottery results from a lawful state-run lottery such as the one conducted by the State of New Jersey. The F.C.C. denied

relief The Supreme Court granted certiorari to resolve conflicts in similar holdings.

After the case was argued but before it was decided, Public Law 93-583 became law and provided at 18 U.S.C., section 1307 that section 1304 shall not apply to the broadcast of lottery information from a source within a state conducting a lottery under the authority of state law.

The United States then argued to dismiss the case as moot. Although New Hampshire did not argue their case before the Court, as an intervenor they disputed the suggestion of mootness claiming section 1307 does not grant full relief. New Hampshire protested that neighboring Vermont does not conduct a state-authorized loftery and Vermont broadcasters will not be allowed to broadcast to New Hampshire listeners lottery results from the New Hampshire state lottery. Whether this constituted a denial of First Amendment rights was not litigated and the case was remanded so the Court of Appeals could consider its mootness under section 1307.

Justice Douglas' dissent disputed that this case became moot. He found it shocking "that a radio station or a newspaper can be regulated by a court or by a commission, to the extent of being prevented from publishing any item of 'news' of the day." The Constitution, he contended, barred such prior restraint.

Regardless of the outcome of this case, the condition remains that section 1304 as amended continues to inhibit the state-authorized New Hampshire lottery with respect to New Hampshire residents who listen to Vermont radio stations and Vermont residents who might wish to cross the state line and participate.

Entertainment

Erznoznik v. City of Jacksonville (43 LW 4809)

The facial validity of a Jacksonville, Florida, ordinance was challenged because it prohibited displaying nudity in a film shown by a drive-in movie theatre with a screen visible from a public street or place. The lower courts upheld the ordinance as a legitimate exercise of police power which did not infringe First Amendment rights. In a 6-3 decision delivered by Justice Powell the Supreme Court reversed and found the ordinance facially invalid and a violation of First Amendment rights.

The Court majority held that discriminating among movies on the basis of content deters showing movies containing nudity however innocent or even educational. Powell claimed that "even a traffic

regulation cannot discriminate on the basis of content unless there are clear reasons for the distinction." Above all else, according to the opinion, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."

The ordinance could not be justified as a traffic regulation since it singled out movies containing nudity from all other movies that might distract a passing motorist. This was held to be underinclusive legislation and thus an improper restriction of expression based on subject matter.

If designed to protect children against viewing films, the ordinance was found to be in improper exercise of police power since it was not directed against sexually explicit nudity.

Powell concluded that "the deterent effect of this ordinance is both real and substantial" since theatre operators "must either restrict their movie offerings or construct adequate protective fencing which may be extremely expensive or even physically impracticable." The precision of drafting and clarity of purpose, necessary to satisfy vigorous constitutional standards, were deemed absent in this ordinance.

Justices Burger and Rehnquist dissented claiming it was absurd to suggest that the ordinance suppresses the expression of ideas. They felt the Court majority sacrificed legitimate state interests which sought "to regulate certain unique exhibitions of nudity" through a narrow and properly drawn ordinance.

Southeastern Promotions v. Conrad (43 LW 4365)

Directors of the Chattanooga Memorial Auditorium, a city-leased theatre, concluded from what others reported that an application to present the rock musical "Hair" should be rejected as not "in the best interest of the community." The District Court, later affirmed by the Court of Appeals, concluded after a three-day hearing on the content of "Hair" that the production contained obscene conduct not entitled to First Amendment protection.

In an opinion delivered by Justice Blackmun, with Justices Douglas, Burger, White, and Rehnquist dissenting, the Court held that the denial of use of the municipal facilities for this production was based on personal judgment about the musical's content and this constituted prior restraint. Prior restraint, they held, can only be constitutionally sanctioned when "it takes place under procedural safeguards designed to obviate the dangers

of a censorship system." In this case the procedural safeguards were lacking. The Court outlined how otherwise constitutionally protected interests in free expression can be obviated: (1) the burden of instituting judicial proceedings and proving that the material is unprotected must rest on the censor; (2) any restraint before judicial review can be imposed exists only for a specified brief period and only to preserve the status quo; and (3) a prompt judicial determination must be assured. In this case the petitioner rather than the censor bore the burden for obtaining judicial review and the burden of proof. Since effective review on the merits of the request was not obtained until more than five months later, the system did not provide a procedure for prompt judicial review. Further, "during the time prior to judicial determination, the restraint altered the status quo. Petitioner was forced to forego the initial dates planned for the engagement and to seek to schedule the performance at a later date. The delay and uncertainty discouraged use of the forum."

The Court declined to react to the standard of obscenity applied or whether the production was in fact obscene. Blackmun concluded, "the standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimum restriction of First Amendment rights necessary under the circumstances."

Justice Douglas' dissent agreed with the Court that the censors' conduct constituted impermissible prior restraint but the fault was not in the absence of procedural safeguards, he claimed; but in the act of censorship itself--which enables control of the flow of distrubing and unwelcome ideas to the public. Douglas concluded, "as soon as municipal officials are permitted to pick and choose, as they are in all socialist regimes, between those productions which are 'clean and healthful and culturally uplifting' in content and those which are not, the path is cleared for a regime of censorship under which full voice can be given only to those views which meet with the approval of the powers that be."

Justices White and Burger dissented out of fear that the majority ruling might be interpreted to require that the Chattanooga authorities permit the public showing of "Hair" in the municipal auditorium. Justice Rehnquist dissented because he does not believe that "fidelity to the First Amendment requires the exaggerated and rigid procedural safeguards which the Court insists upon in this case."

Education

Board of School Commissioners of Indianapolis v. Jacobs, et al. (43 LW 4238)

This case pertained to an unofficial high school student newspaper that contained "earthy" words. The lower court held as unconstitutionally vague a school board regulation which prohibited distribution of literature likely to produce significant disruption of educational processes.

Because this was a class action suit and the class was not properly identified the judgment of the lower court was vacated.

In his dissent Justice Douglas expressed distress at the Court's readiness to find the controversy moot. He lamented that for technical reasons the Indianapolis School Board could not continue enforcement of regulations declared unconstitutional by the lower courts. This Board-imposed system of prior restraint on student publications meant to Douglas that "any student who desires to express his views in a manner which may be offensive to school authorities is now put on notice that he faces not only a threat of immediate suppression of his ideas, but also the prospect of a long and arduous court battle if he is to vindicate his rights of free expression. Not the least inhibiting of all these factors will be the knowledge that all his efforts may come to naught as his claims are mooted by circumstances beyond his control." Douglas wanted the case resolved on its merits.

Government

James O Eastland, et al. v. United States Servicemen's Fund, et al. (43 LW 4635)

The Senate Subcommittee on Internal Security inquired into activities of the United States Servicemen's Fund to determine if they were potentially harmful to the morale of the United States Armed Forces. The Committee in the course of its inquiry subpoened all pertinent records from the bank where the organization had an account. The organization then brought action against the Senate Committee and the bank to avoid the subpoena on First Amendment grounds. After the District Court dismissed the action the Court of Appeals reversed holding that "although courts should hesitate to interfere with congressional actions even where First Amendment rights are implicated, such restraint should not preclude judicial review where no alternative avenue of relief is available, and that if the subpoena was obeyed respondents' First Amendment rights would be violated."

The Supreme Court reversed the Court of Appeals after granting certiorari to determine whether a federal court may enjoin issuance by Congress of a subpoena directing a bank to produce records of an organization claiming a First Amendment privilege for those records which were allegedly the equivalent of confidential membership lists.

Justice Burger referred to the "absolute nature" of the speech or debate protection afforded Congress and noted their immunity from judicial interference. This position prevailed over the organization's claim that the purpose of the subpoena was to "harass, chill, punish, and deter them" in the exercise of their First Amendment rights and once this congressional infringement is alleged the judiciary may intervene to protect these rights.

Justice Douglas would have affirmed the judgment of the Court of Appeals. He contended that congressional power may not be used to deprive people of their First Amendment rights and such power should not receive immunity from action "for which wrongdoers normally suffer."

IV. Docketed: Other Cases

Disposed

The Supreme Court took action which resulted in allowing the holding of the lower court to prevail in each case which follows except for three in which the lower court judgment was vacated. The issues reported are pertinent to the First Amendment but are not necessarily inclusive of all issues raised by the appeal.

Obscenity

Issue: Was the application of the Miller test (413 U.S. 15) to publications which were sold at the time the Memoirs test (383 U.S. 413) was in effect a denial of due process and a violation of the First Amendment? (Certiorari denied. Pierce v. Alabama, 43 LW 3376)

Ruling below: The defendant was convicted for knowingly transporting obscene books by common carrier. The case was reviewed on remand from the Supreme Court and affirmed. The books were found obscene under both the new (Miller) and the old (Memoirs) standards. The government was not required to prove the defendant knew the books were obscene but only that he was aware of the nature of the materials. Issues: Was the law prior to June 21, 1973, unconstitutionally vague and "did conviction under

the 'Memoirs' standard without any evidence that publications exceeded national community standards or were utterly without redeeming social value, violate .... (constitutional rights)?" (Certiorari denied. Groner v. U.S., 43 LW 3019.)

Ruling below: The defendants were convicted for transporting materials under both the new and old obscenity tests. Issue: Were obscenity convictions obtained prior to the new tests or obtained under such vague and unworkable standards as to deprive defendants of a fair trial? (Certiorari denied. New Orleans Book Mart v. U.S., 490 F.2d 76, 43 LW 3110.)

Ruling below: After the case was remanded for reconsideration under the new (Miller) obscenity tests the conviction of the defendant for selling obscene items was affirmed. Issues: Was the Virginia statute void for vaguesness under the Miller test? Do seized publications and films constitute obscenity under the new guidelines? Was the use by the state court of purely local rather than statewide community standards a violation of First Amendment rights? (Certiorari denied. Goldstein v. Virginia, 43 LW 3098.)

Issues: Does use of local contemporary community standard as opposed to a statewide standard violate defendant's First Amendment rights? "Can U.S. Supreme Court rulings on obscenity effecting substantial change in application of constitutional principles be applied retroactively for conduct occurring prior to these decisions?" (Certiorari denied. Winslow v. Virginia, 43 LW 3053.)

Ruling below: A Wisconsin obscenity statute which did not specifically define prohibited sexual conduct as required by the Miller tests was held unconstitutional and the convicted seller of obscene material was granted habeas corpus. (Judgment vacated. Divine v. Amato, 43 LW 3268.)

Ruling below: A bookstore owner was not denied his constitutional rights when a municipal judge "allegedly without statutory or any other legal authority, ordered mass seizure and confiscation of over 3,500 books and magazines after (a) cursory 13-minute examination of only (a) few of (the) materials seized." (Certiorari denied. Atheneum Book Store, Inc. v. City of Miami Beach, 43 LW 3321.)

Issue: Was the defendant denied due process when convicted for transporting twenty-four allegedly obscene films when only a few of the films were presented to and reviewed by the jury? (Certiorari denied. Hill v. U.S., 43 LW 3427.)

Issue: Is an injunction which prohibits continued exhibition of specific films vague and overbroad if it also "prohobits forever exhibitions of any and all similar types of films that have neither been shown by exhibitor-defendants nor ever viewed by the trial court?" (Judgment vacated. United Theatres v. Florida, 259 So2d 210, 43 LW 3112.)

Issues: Was an injunction against exhibiting certain films vague and overbroad for also prohibiting exhibition of any and all similar type films? Is there a denial of rights when a theatre is closed forever as a public nuisance after showing films which were held to violate state obscenity standards? (Judgment vacated. United Theatres v. Florida, 259 So2d, 215, 43 LW 3150.).

Ruling below: An Ohio court held that an adversary hearing establishing the obscenity of seized materials was not a prerequisite to admission into evidence of allegedly obscene materials. Issue: Is the purchase by authorities of allegedly obscene materials a seizure that is unconstitutional for failure to hold a prior judicial determination of obscenity? (Appeal dismissed. Kensinger v. Ohio, 42 LW 3283.)

In both Tobalina v. California (43 LW 3233) and Blank v. California (43 LW 3231) three justices (Brennan, Stewart, and Marshall) favored remanding the cases for a new trial under local community standards while Justice Douglas preferred to reverse the lower court conviction. The three doubted that the obscenity of the disputed materials was determined by applying local community standards. (Certiorari denied.)

Ruling below: A trial court injunction prohibiting sale of "obscene" magazines was upheld. Issue: Are Ohio statutes invalidated by the First Amendment because they define and proscribe production or dissemination of obscene material as defined by the statutes? (Certiorari denied. Adult Book Store v. Ohio, 43 LW 3049.)

Issue: Does conviction for exhibiting an obscene motion picture which was as disseminated limited to adults with adequate precautions taken to prevent intrusions upon the sensibility of unwilling viewers violate the petitioner's First Amendment rights? (Certiorari denied. Price v. Virginia, 43 LW 3052.)

Ruling below: The defendants were charged with conspiracy to nationally distribute allegedly obscene motion pictures and were not entitled to relief against seizure of the master negatives and prints but were permitted to make copies of the prints to prevent suppression of the film pending trial. Issue: Is the First Amendment satisfied by permitting film owners to reproduce film at an approximate cost of $10,000 when the U.S. Attorney

has unlimited power to continue to seize all copies. (Certiorari denied. Art Theatre Guild, Inc v Parrish. 503 F 2d 133, 43 LW 3455.)

Issue: Does a state statute constitute an unconstitutional inhibition of free expression by allowing any citizen to bring abatement action in the name of the state to control exhibition of obscene material? (Appeal dismissed. Art Theatre Guild, Inc. v. Ohio, 43 LW 3125.)

Ruling below: An Ohio court held that the First Amendment was not violated by an Ohio nuisance abatement statute which provided judicial procedures to close bookstores and confiscate bookstore property upon finding that publications sold by the bookstore are obscene. Issue: Does the statute pose an impermissible prior restraint on distribution and circulation of materials and publications? (Judgment vacated. Marks v. Leis, 43 LW 3456.)

Ruling below: A strip-tease dancer who removed all of her clothing and exhibited her private parts to a theatre audience and performed a simulated sex act produced obscene acts within the Miller definition (413 U.S. 15). The dancer was properly convicted for obscenity and not merely under the public nudity provision of a city ordinance Issues: Can a state without violating the First and Fourteenth Amendments, apply to a performance on a theatre stage a criminal ordinance prohibiting nudity in public? Is the First Amendment violated by a state court finding that burlesque strip-tease dance is obscene? (Certiorari denied. Marshall v. City of Seattle, 521 P.2d 693, 43 LW 3285.)

Ruling below: The lower court upheld a Maryland statute which established a censorship board for review and licensing of publicly exhibited motion pictures. Issue: Is the Maryland statute unconstitutional? (Judgment affirmed. Star v. Preller, 43 LW 3140.)

Although the above do not constitute all the obscenity questions raised for Supreme Court review, they are nevertheless representative of the major questions which the Court declined to answer in this troublesome area of the law.

Education

Ruling below: Professors on a Law School disciplinary committee did not violate due process by expelling a student on charges that he published a leaflet containing libelous statements about other law professors. Issue: Can a disciplinary

committee indefinitely expel a student for allegedly distributing a leaflet through the mail? (Certiorari denied. Keys v. Sawyer, 43 LW 3155.)

Ruling below: The employment contracts of faculty and administrative employees of Oklahoma College of Liberal Arts were not renewed for alleged divisiveness and this violated their constitutional rights since they were exercising First Amendment rights and these activities were not burdensome to the school. Issue: Were the contracts denied for reasons violative of employees rights to free expression? (Certiorari denied. Allen v. Rampey, 501 F.2d 1090, 43 LW 3408.)

Labor

Ruling below: The lower court held an employer in violation of the Taft Act for statements made by a company official. Issue: Does an employer lose protection of the First Amendment by causing an utterance which could reasonably have been misunderstood by employees? (Certiorari denied. Rollins Telecasting, Inc. v. NLRB, 43 LW 3101.)

Ruling below: There is no infringement of the First Amendment rights of radio and TV commentators on public affairs who are required to pay dues to a union having a union shop agreement with their employers. Issues: Does the Federal Communication Act's fairness doctrine prohibit restrictions on employment of public affairs commentators? Does the Taft Act provision for compulsory dues payment violate commentators' First Amendment rights? (Certiorari denied. Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305, 43 LW 3260.)

Government

Ruling below: The Trading with the Enemy Act and Foreign Assets Control regulations which require the importation of publications from North Viet Nam to be licensed are constitutional and have little impact upon free speech. Issue: Do these regulations constitute restraint on free speech and publication? Are regulations which provide no standard for administrative officials to issue or deny licenses for importation of publications unconstitutionally broad, arbitrary, and vague? (Certiorari denied. Orring v. Secretary of Treasury, 497 F.2d 684, 43 LW 3297.)

Public Demonstration

Ruling below: A shopping center was not in violating of petitioner's right to communicate. Issue: Does a shopping center open to the public interfere with First Amendment rights by prohibiting use of its property for solicitation or discussion

which is unrelated to the center and where alternative and effective channels of communication are available? (Certiorari denied. Diamond v. Bland, 521 P.2d 460, 43 LW 3125.)

Issue: Were First Amendment rights violated when an emergency ordinance prohibiting use of public parks between 7:00 p.m. and 7:00 a.m. was applied to a group seeking to hold demonstrations? (Certiorari denied. Gilbert v. North Carolina, 43 LW 3267.)

Ruling below: The lower court denied relief from a statute which made it unlawful to display names of war dead during a war or draft resistance rally. Issue: Is the statute violative of protected free expression? (Certiorari denied. Anderson v. Trimble, 519 P.2d 1352, 43 LW 3155.)

Government Personnel

Ruling below: A police regulation of hair styles and facial hair of policemen does not violate First Amendment rights of officers since such pertains to the discipline and morale of a quasi-military organization. Issue: Should the city be required to show a compelling state interest which would justify any infringement of First Amendment rights? (Certiorari denied. Akridge v. Barres, 321 A.2d 230, 43 LW 3286.)

Personal Rights

Ruling below: The case was dismissed for lack of jurisdiction. Issue: Does implantation of electrodes for the purpose of inhibiting an individual's action abridge freedom of speech, violate the right to privacy, and impose involuntary servitude in violation of constitutional rights? (Certiorari denied. Brown v. Baylor University Medical Center, 43 LW 3364.)

Libel

Ruling below: A consultant to NASA was a public official and hence could not recover in a libel action where there was an absence of proof of deliberate falsification or careless publication. Issue: Do standards (for recovery of damages in a libel action brought by a public official) established in New York Times v. Sullivan, 376 U.S. 254 (1964) apply to a private scientist who is temporarily involved in a federal project? (Certiorari denied. 493 F.2d 1397, 43 LW 3102.)

Ruling below: The District Court granted summary judgment for a publisher under New York Times v. Sullivan standards. Issue: Does the First Amendment bar prosecution of a book publisher who published defamatory statements which were not know by the

publisher to be false and for which no reason for serious doubt as to truth existed? (Certiorari denied. 486 F.2d 1356, 43 LW 3066.)

Criminal Law

Ruling below: The defendant was convicted for interference with IRS officers. Issue: Did IRS agents who allegedly interfered with and disrupted the peaceful picketing of those protesting the seizure of a taxpayer's business violate First Amendment rights of the protestors? (Certiorari denied: Mitzner v. U.S., 43 LW 3126.)

Social Security

Ruling below: The absolute discretion granted to welfare commissioners to allow or refuse welfare rights organizations to communicate orally and by leaflet with welfare recipients in the waiting room of a welfare office violated the free speech rights or organization workers. (Certiorari denied. Wyman v. Albany Welfare Rights Organization, 43 LW 3008.)

Pending

In each of the cases reported below the case has either been argued before the Supreme Court and no written opinion has yet been rendered or the Court has yet to hear the case or otherwise dispose of it. Since the final disposition of some cases had not been reported at the time this review was prepared, the status of some pending cases may have changed before the official end of the Court term.

Civil Rights

Ruling below: Unrestricted areas of a military installation that are open to the public cannot be selectively closed to political candidates or distributors of unapproved literature. Issue: Does the commanding officer of a military base have authority to prohibit political speeches or the unauthorized distribution of publications on his base? (David v. Spock, 512 F.2d 953, 43 LW 3455.)

Ruling below: An injunction against distribution of a book by a psychiatrist pertaining to a case history of a former patient and her family does not constitute prior restraint upon freedom of the press. Issue: Does it violate the First Amendment to completely prohibit distribution and sale of a "truthful, nonobscene book concerning matters of scientific and medical interest and importance"? (Roe v. Doe, 43 LW 3047.)

Government Personnel

Ruling below: A former CIA employee who, as a condition of employment, agreed in writing to submit for approval all post-resignation publications is not denied freedom of speech providing submissions receive prompt attention and approval is only denied to classified material not placed in the public domain by prior disclosure. Issues: Does the agreement constitute prior restraint forbidden by the First Amendment? Can the CIA, without violating the First Amendment, prevent publication of classified information without showing that its disclosure would "surely result in direct, immediate, and irreparable injury to the Nation or its people"? Does an injunction restraining publication of certain materials violate the First Amendment rights of a book publisher who is prevented from publishing the full manuscript of a book written under contract? (Alfred A. Knopf, Inc., v. Colby, 43 LW 3557.)

Labor

Ruling below: A municipal ordinance was a valid exercise of governmental power which makes it unlawful for any person "to engage in picketing before or about the residence or dwelling of any individual." The ordinance was held to insure a feeling of well being, tranquility, and privacy for members of the community. Issue: Does a municipal ban on all residential picketing violate First Amendment rights? (Garcia v. Gray, 506 F.2d 539, 43 LW 3557.)

Obscenity

Ruling below: The Illinois Supreme Court concluded that an Illinois statute's definition of prurient interest as "a shameful or morbid interest in nudity, sex or excretion" was a sufficiently specific definition to provide adequate notice of prohibited sexual conduct as required by the "patently offensive test" of Miller v. California (413 U.S. 15). Issue: Was this conclusion in error? (Ridens v. Illinois, 43 LW 3542.)

Issue: Does a California obscenity statute which exempts from criminal liability film projectionists who have no financial interest in the place of business deny equal protection to bookstore clerks? (Kuhns v. California, 43 LW 3259.)

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COURT DECISIONS

Bigelow v. Virginia, 44 L.Ed.2d 600, 95 S.Ct. 2222 (1975). Virginia statute, under which newspaper editor was prosecuted for publishing advertisement relating to availability of abortions in another state, unconstitutionally infringed on the editor's First Amendment rights of free speech and press which were not lost merely because a commercial advertisement was involved.

Board of School Commissioners of City of Indianapolis v. Jacobs, 43 L.Ed.2d 74, 95 S.Ct. 848 (1975). Six students involved in the publication and distribution of a student newspaper were supported in lower courts that the school officials and regulations had infringed their First Amendment rights, but the high court declared the issue moot upon graduation of the student plaintiffs.

Cantrell v. Forest City Publishing Co., 42 L.Ed.2d 419, 95 S.Ct. 465 (1974). Newspaper publisher and reporter held liable for invasion of privacy on basis of evidence that reporter, acting within scope of employment at newspaper, had portrayed plaintiffs in false light through knowing or reckless disregard for truth.

Cox Broadcasting Corp. v. Cohn, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975). The protection of First and Fourteenth Amendments bars a state from extending a cause of action for damages for invasion of privacy based upon the publication of the name of a deceased rape victim which was obtained by a newsman from official court records open to the public.

Doran v. Salem Inn, Inc. 45 L.Ed.2d 648, 95 S.Ct. 2561 (1975). Nude dancing in barrooms is entitled to protection of First Amendment under certain circumstances. (Dicta)

Eastland v. United States Servicemen's Fund, 44 L. Ed.2d 324, 95 S.Ct 1813 (1975). Members of Senate Subcommittee and its counsel held immune from judicial interference by issuance of subpoena for documents required for investigation due to speech and debate clause of Article I, Section 6, Clause 1 of United States Constitution.

Erznoznik v. City of Jacksonville, 45 L.Ed.2d 125, 95 S.Ct. 2268 (1975). Ordinance prohibiting showing of films containing nudity by a drive-in movie theater when its screen is visible from a public street or place held to violate First Amendment by its failure to satisfy the rigorous constitutional standards that apply when government attempts to regulate expression.

Huffman v. Pursue, Ltd., 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975). In Ohio nuisance proceeding against the operator of a motion picture theater which had engaged in a course of conduct of displaying obscene motion pictures, it was held that federal courts will ordinarily not interfere with state criminal proceedings which are applicable to a state civil proceeding akin to criminal proceeding and therefore remanded the case.

Meek v. Pittinger, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975). Pennsylvania statute for loan of public school textbooks to nonpublic school children held not violative of First Amendment, but provisions for loans to schools of instructional material and equipment, and for auxiliary services held unconstitutional.

MTM, Inc. v. Baxley, 43 L.Ed.2d 636, 95 S.Ct. 1278 (1975). In Alabama nuisance proceeding against a theater alleged to violate local obscenity laws, the Supreme Court held it was without jurisdiction to consider appeal from an order of a three-judge Federal District Court that did not rest upon resolution of the merits of plaintiff's constitutional claim.

Murphy v. Florida, 44 L.Ed.2d 589, 95 S.Ct. 2031 (1975). Juror's exposure to publicity about crime charged against state defendant, or about his prior convictions, held not to deprive petitioner of due process, since he had failed to show that setting of the trial was inherently prejudicial or that the jury selection process permitted an inference of actual prejudice.

O'Connor v. Donaldson, 45 L.Ed.2d 396, 95 S.Ct. 2486 (1975). A sane and innocent person who is nondangerous and capable of surviving safely in freedom has a constitutional right not to be physically confined in a mental hospital.

Patterson v. Superior Court of California, 43 L.Ed.2d 645, 95 S.Ct. 1254 (1975). Application by newspaper editor and reporters for stay of state court proceedings investigating possible violations of court order sealing grand jury transcript, granted pending review of the full court by Justice Douglas.

Southeastern Promotions, Ltd. v. Conrad, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975). A municipal board's denial of use of municipal theater for showing the musical "Hair" held an unconstitutional prior restraint in view of lack of constitutionally required minimal procedural safeguards.

Times-Picayune Publishing Corp. v. Schulingkamp, 42 L.Ed.2d 17, 95 S.Ct. 1 (1974). Justice Powell granted a stay of an order of the trial court restricting media coverage of two trials where the record indicated a possible inconsistency with Supreme Court decisions and where alternative means for defendants' rights to fair trials were available.

Twentieth Century Music Corporation v. Aiken, 45 L.Ed.2d 84, 95 S.Ct. 2040 (1975). Restaurant owner's reception of radio broadcasts of copyrighted musical compositions, where the broadcaster had been licensed to perform the composition publicly for profit, and where broadcasts were heard through four speakers by employees and customers, did not constitute a "performance" of the copyrighted works and thus did not constitute copyright infringement.

United States v. New Jersey State Lottery Commission, 43 L.Ed.2d 260, 95 S.Ct. 941 (1975). The High Court remanded to the Court of Appeals to determine mootness of issue of federal action involving propriety of broadcast of state-run lottery information ostensibly in violation of federal statute which had subsequently been amended.